SELECT CASES

ARGUED AND ADJUDGED IN THE

High Court of Chancery,

BEFORE

THE LATE LORDS COMMISSIONERS OF THE GREAT SEAL

AND

THE LATE LORD CHANCELLOR KING,

FROM THE YEAR 1724 TO 1733;

WITH TWO TABLES, ONE OF THE NAMES OF THE CASES AND THE OTHER OF THE PRINCIPAL MATTERS.

BY

A GENTLEMAN OF THE TEMPLE.

The Second Edition:

WITH

EXPLANATORY NOTES AND REFERENCES TO FORMER AND SUBSEQUENT DETERMINATIONS.

BY

STEUART MACNAGHTEN,

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW.

LONDON:
V. & R. STEVENS AND G. S. NORTON,
Law Booksellers and Publishers;
(*Successors to the late J. & W. T. CLARKE, of Portugal Street,*)
26, BELL YARD, LINCOLN'S INN.

MDCCCL.

LONDON:
STEVENS AND CO., PRINTERS, BELL YARD,
LINCOLN'S INN.

PREFACE.

It has been the object of the Author of the following Notes to the Second Edition of "The Select Cases in Chancery," to present to the Student of Equity an elementary exposition of some of its leading principles, which are to be found in the original text; and he ventures to hope that, in the hands of those more advanced, the value of the Reports will not be diminished by the addition of the Notes.

S. Macnaghten.

Old Square, Lincoln's Inn,
October, 1850.

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SELECT CASES

IN THE

COURT OF CHANCERY, ETC.

NUTT *v.* BURRELL.

De Term. Paschæ, May 9, 1724. *In Cancellaria.*

Legacy not forfeited in equity, though ordered to be so by the will.

A. GIVES B. a legacy, on pain of forfeiture of it in case he should give his wife any trouble in relation to his estate; and makes his wife executrix. B. brings a bill against the wife, for which there was very little colour, and among other particulars demands the legacy. The Chancellor was of opinion, that the suit was very frivolous; and though he would not make the legacy forfeit, yet declared, if he did not pay her the costs she had been out of purse, he would dismiss the bill.

Conditions are of two sorts, precedent and subsequent. "There are no technical words to distinguish them, but the same words may indifferently make either, according to the intent of the person who creates it." *Robinson* v. *Comyns*, Forrest. 166. Generally speaking, in the construction of conditions, whether precedent or subsequent, Courts of equity will regard the spirit, rather than the letter, of the instrument imposing the condition: *Northcote* v. *Duke*, Ambl. 511. The practice in equity with respect to conditions subsequent (their obvious tendency being to devest an estate already vested) is always to construe them with the utmost strictness in favour of the legatee; and, where no injustice accrues to a third party from such a construction, the Court has

uniformly struggled to avoid the declaration of a forfeiture: *Nutt* v. *Burrell*: the mere imposition of forfeiture after an absolute gift is treated as only annexing a condition in terrorem; as, for instance, a condition that a legatee shall not dispute the will, will not, per se, deprive him of the legacy if he does dispute it: *Powell* v. *Morgan*, 2 Vern. 90; *Loyd* v. *Spillet*, 3 P. Wms. 344. So a legacy to A., provided she marry with the consent of B. and C., on the death of B., the condition being a subsequent one, became impossible, and the legacy unconditional: *Peyton* v. *Bury*, 2 P. Wms. 626. There must be something more than a mere declaration of forfeiture to show that the condition was not in terrorem only; as where the legacy is given over upon the happening of any event to another person; in this case, it matters not whether the condition is precedent or subsequent, for the ulterior legatee is held to be as much an object of the testator's bounty, as the first legatee, and will accordingly be permitted to avail himself of the forfeiture: *Cleaver* v. *Spurling*, 2 P. Wms. 528; *Roundel* v. *Currer*, 2 Bro. C. C. 67; *Cooke* v. *Turner*, 14 Sim. 493; *Cooke* v. *Cholmondeley*, 11 Jur. 702, V. C.; even where it is declared that the forfeiture shall enhance the residue, for the residuary legatee is, quoad the legacy in question, a particular legatee: *Lloyd* v. *Branton*, 3 Mer. 108; *Hawkes* v. *Baldwin*, 9 Sim. 355. Forfeitures, however, are so little favoured by a Court of equity, that if it can put the parties "in the same situation as if the condition had been performed, it will never suffer a forfeiture to attach:" *Taylor* v. *Popham*, 1 Bro. C. C. 168: and a conditional gift will be upheld, even where there is an ulterior limitation, if the terms of the condition are in substance, though not literally, fulfilled: *Hollinrake* v. *Lister*, 1 Russ. 500; *Paine* v. *Hyde*, 4 Beav. 468: and this, whether the condition be precedent or subsequent: *Tanner* v. *Tebbutt*, 2 Y. & C. C. C. 225; *Hollingsworth* v. *Grasett*, 15 Sim. 52. Where a legacy is given over upon a double contingency, as, to a daughter upon her attaining a certain age, or marrying with the consent of a particular person, it is clear that, by her dying under the prescribed age and unmarried, the legacy would be gone: *Piggot* v. *Morris*, post, 27: but if she attains the age, the condition as to consent will be referred to a marriage under the particular age, and the legacy will become absolute: *Knapp* v. *Noyes*, Ambl. 662. With respect to conditions in restraint of marriage, it may be affirmed, that where their effect would amount to a positive prohibition, they are repugnant to "the liberty of the law:" Shep. Touch. 132: and will, on grounds of public policy, be deemed void: *Lowe* v. *Peers*, 4 Burr. 2225; *Morley* v. *Rennoldson*, 2 Hare, 570: but the imposition of a wholesome restriction on the marriage of

a legatee, as, for instance, to obtain the consent of a particular person, *Scott* v. *Tyler*, 2 Bro. C. C. 431; or that the legatee shall not marry a particular person, *Randal* v. *Payne*, 1 Bro. C. C. 55; or before attaining a certain age, *Stackpole* v. *Beaumont*, 1 Ves. 89; is beyond all doubt valid; and where a legacy is given to A., provided she marry with consent, it is not competent for her to claim it before marriage; *Garbut* v. *Hilton*, 1 Atk. 381; but where the consent has been once given, it cannot be retracted, *Dashwood* v. *Bulkeley*, 10 Ves. 230, 242; *Le Jeune* v. *Budd*, 6 Sim. 441. It is to be observed, however, that although conditions in general restraint of marriage are invalid, yet the prohibition may be legally operative by a direction that the benefit shall only be enjoyed until the marriage of the donee; *Jordan* v. *Holkham*, Ambl. 209: for "the use of a thing may be given during celibacy, for the purpose of an intermediate maintenance, and will not be interpreted maliciously to a charge of restraining marriage:" *Godolphin*, cited 2 Dick. 722.

So strongly does the Court lean against a forfeiture, that where a legacy is given on trust for a man until his bankruptcy, *without any limitation over*, such legacy will be held to enure for the benefit of his assignees, upon his bankruptcy: *Brandon* v. *Robinson*, 18 Ves. 429; *Younghusband* v. *Gisborne*, 1 Coll. 400: aliter, where there is a discretionary limitation over: *Godden* v. *Crowhurst*, 10 Sim. 642; *Rippon* v. *Norton*, 2 Beav. 63; *Page* v. *Way*, 3 Beav. 20; *Brandon* v. *Aston*, 2 Y. & C. C. C. 24; *Lord* v. *Bunn*, ib. 98; *Kearsley* v. *Woodcock*, 3 Hare, 185. Of course, there can be no doubt of the assignee's exclusion where there is an express limitation over: *Lewes* v. *Lewes*, 6 Sim. 304; *Churchill* v. *Marks*, 1 Coll. 441. In the case of *Twopeny* v. *Peyton*, 10 Sim. 487, there was a bequest for the special purpose of supporting and maintaining an uncertificated bankrupt, and the assignees were excluded.

LORD LUCY *v.* WATTS.

(APPEAL FROM THE ROLLS.)

De Term. Sanct. Mich. Nov. 7, 1724.

General words of a release restrained in equity to what was the intent of the parties.

THE defendant had a lease from Lord Lucy, of a place called Froster-Court Farm, and also held a farm called Pikes under him at will; on his payment of rent, Lord
[* 2.] Lucy's steward gave him a receipt *in his verbis:—"Received then of —— Watts the sum of 137*l.* 10*s.* in full for half a year's rent due at Lady-day last."

The yearly rent of Froster-Court Farm was 263*l.* and of Pikes 22*l.* The release being general, the defendant insisted he was not obliged to account for the rent of Pikes. To be relieved against which Lord Lucy brought his bill, which was dismissed by his Honour the Master of the Rolls, in regard that he might have his action at law for the rent of Pikes, notwithstanding the generality of the words of the release.

On which an appeal was brought; and the Lord Chancellor declared, he was not satisfied that he had remedy at law; as both these lands might formerly have been held together, and the general words in the * lease might possibly extend to Pikes, contrary to the intent of the parties. If Lord Lucy should not recover at law, I must relieve here; so it would be sending it to law in order to have a new bill: so decreed an account.

* *Qu.* release.

Bacon v. *Harris.*

In this case was cited, by Mr. *Talbot*, the case of *Bacon* v. *Harris*, two or three terms ago in this court, which was this: a tenant got a receipt in full to the date; bill was brought for account: the tenant insisted he was not obliged

to any account previous to the receipt, because his vouchers might be lost, and not preserved on account of the receipt; so that he might be made to suffer, not through any default of his own, but by relying on the receipt. But there being great reason to believe the receipt insisted on was obtained either through fraud, or by mistake, and that the tenant had not paid all that was due to the time of the receipt; account was ordered to be taken previous to the receipt; and to pay costs.

The admission of parol evidence to contradict the terms of a written contract militates against the policy of the law, (see *Christmas v. Christmas*, post,20,) but this policy, which excludes such evidence, is not so unbending, as to prevent even in a court of law the party who has given a receipt from showing that it was obtained by fraud or misrepresentation: *Benson* v. *Bennett*, 1 Camp. 394; *Skaife* v. *Jackson*, 3 B. & C. 421; *Farrar* v. *Hutchinson*, 9 Ad. & E. 641; or, in fact, without the consideration for which it professes to be given: *Lampon* v. *Corke*, 5 B. & A. 606; for "a receipt is an admission only, and the general rule is that an admission, though evidence against the person who made it and those claiming under him, is not conclusive evidence, except as to the person who may have been induced by it to alter his condition; a receipt therefore may be contradicted or explained:" *Graves* v. *Key*, 3 B. & Ad. 313; and see the cases there cited. It may then be assumed that, although it is generally competent for a party at law to show under what circumstances a receipt is given, and although, as a general rule, a party cannot proceed in equity where he has a legal remedy (see *Child* v. *Pitt*, post,16), yet inasmuch as fraud, accident, and mistake, are matters more especially cognizable in equity, its jurisdiction is not barred by reason of there being a concurrent jurisdiction at common law. It is to be observed, that where the evidence, whereby the intent of the parties to any instrument is to be elicited, lies in the breast of the party whose interest it is to have the instrument read without explanation, the other party is precluded at law from obtaining from a party to the action a discovery of the circumstances under which the instrument was executed; whereas the Court of Chancery will enforce a disclosure, in order that general words may not be extended to include anything contrary to the intent of the parties. "From the mode of proceeding at common law, a man,

with the full knowledge of facts, which would show the truth and justice of the case, may, by concealing those facts within his own breast, and merely for want of disclosure or evidence, succeed in recovering a demand which he knows to be satisfied, or in resisting a demand which he knows to be just:" per Lord *Langdale*, in *Storey* v. *Lord George Lennox*, 1 Keen, 349; see *Floyer* v. *Sydenham*, next case, in notis.

FLOYER *v.* SYDENHAM.

Oct. 29, 1724.

A person made a will of a settled estate, the heir claiming under the settlement may have the deeds, &c., produced before he tries the validity of the will.

2 Chan. Ca. 4. A PERSON deriving under a settlement consulted counsel whether he could suffer a recovery, and bar the remainders; the counsel whom he consulted being of opinion that he could, pursuant to their opinion he suffered a recovery, and made a will in prejudice of the persons claiming under the settlement. The validity of the will being controverted, and also whether, supposing it to be a good will in point of law, he was enabled by the recovery to defeat the remainders, and dispose of the estate; to which purpose it [* 3.] would be necessary to have all deeds, writings, and *family settlements brought into court, to see whether he had such power: it was insisted, that the most natural thing was to try the validity of the will first, which if not found to be a good one as to the execution, sanity, &c., of the person, there would be an end of the question; for that if he had not made a will valid in point of law, it would be idle and vain to examine whether he had a power so to do.

On the other hand it was insisted, that it would be totally improper to examine into the validity of the act done, without previously examining the power of doing it; and that

even an hæres factus was entitled to see the writings against an heir at law, though the one had only an instituted right under the municipal laws of the country, and the other had a natural inherent right. The case of the *Duke of Newcastle* was cited, who was only an hæres factus, and there the papers were ordered to be brought into court for perusal. In the case of the *Earl of Suffolk* and *Earl Ferrers*, for the assistance of the heir at law against the devisee, which is the present case.

Duke of Newcastle's Case.

Chancellor.—It is most natural to see whether he could dispose: to examine whether he has made a will, before it be known whether he had a power, would be unnecessary, and really impertinent; and therefore decreed, that all deeds should be produced, and the counsels' opinions; not as they will be a guidance to the Court, but for the case on which they might be founded; for papers may in those cases be mentioned, which otherwise might be suppressed and not come to light.

By the common law of England it is an established rule, that "nemo testis debet esse in propriâ causâ;" so that at law a man may prefer a most unconscionable claim, and at the same time have in his possession the evidence of its invalidity, while the defendant would be precluded from putting any question to the plaintiff, with a view to rebut the claim, whether out of the plaintiff's own mouth or from documents in his custody; and, in this sense, so far as regards their forms of procedure, Courts of equity may be said to abate the rigour of the common law. It has been termed "the height of judicial absurdity, that in the same cause, between the same parties, and in the examination of the same facts, a discovery by the oath of the parties should be permitted on one side of Westminster Hall and denied on the other:" 3 Bl. Com. 382. Suffice it, however, to say, that such power does exist in a Court of equity, and will be exerted in favour of any party who can consistently with its rules invoke this peculiar jurisdiction. These rules have been very succinctly stated in the five propositions laid down by Vice-Chancellor Wigram, in his book on Discovery, p. 15. 1st. "The pleadings in a cause, and rules of practice unconnected with the laws of discovery, determine à priori what question or questions in the

cause shall first come on for trial. And the right of a plaintiff to discovery is in all cases confined to the question or questions in the cause which, according to the pleadings and practice of the Courts, is or are about to come on for trial." 2nd. "It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery upon oath as to all matters of fact, which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit." 3rd. "The right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the 'plaintiff's case,' and does not extend to a discovery of the manner in which the 'defendant's case' is to be exclusively established, or to evidence which relates exclusively to his case." 4th. "Every objection to discovery which is founded upon a denial of the plaintiff's right of suit, or of his right to proceed with it in its existing state, should regularly be taken by demurrer or plea, according to the circumstances of the case; and where the objection is not so taken, and the defendant answers the bill, he will in general be held to have waived the objection, and will be obliged to answer the bill 'throughout.'" 5th. "Every objection to discovery, which is not founded upon a denial of the plaintiff's right of suit, or of his right to proceed with his suit in its existing state, but depends exclusively upon the nature of the discovery sought, may regularly be taken by answer as well as by demurrer or plea. As the mode of taking objections of this nature is thus unfettered by rules of form, a defendant who has not actually answered an interrogatory or interrogatories, to which the objection may apply, cannot, as a general rule, be held to have waived it upon any merely technical ground." But with reference to the relief prayed, a plaintiff in equity has, generally speaking, a right to a discovery of all that the defendant knows, believes, or thinks respecting his own case, and to compel a defendant to disclose what he has written or spoken to others, not being his professional advisers; for "such communications are not necessary to the conduct of judicial business and the defence or prosecution of men's rights by the aid of skilful persons:" *Bolton* v. *Corporation of Liverpool*, 1 Myl. & K. 91: and no degree of confidential relationship, except such as exists between a solicitor and his client, will exempt a defendant from the production of communications made even in contemplation of the suit: *Storey* v. *Lord John George Lennox*, 1 Keen, 341, affirmed 1 Myl. & Cr. 525; but if the communications have passed between persons who are privileged, it is not necessary that they should have been made in contemplation of the suit, provided it is established that they were made in the course of the dispute which is the subject

of the suit: *Clagett* v. *Phillips*, 2 Y. & C. C. C. 82. The privilege has been extended to a person employed by the solicitor to collect evidence: *Steele* v. *Stewart*, 13 Sim. 533.

If the defendant admits the possession of documents at all relating to the matters in the bill, and does not positively deny that they relate to the case made by the bill, the mere allegation that they are the evidences of his own title will not protect them from production: *Hardman* v. *Ellames*, 2 Myl. & K. 745; *Smith* v. *Duke of Beaufort*, 1 Hare, 507, affirmed 1 Phill. 209; see also *Bannatyne* v. *Leader*, 10 Sim. 230; *Hercy* v. *Ferrers*, 4 Beav. 97; *Combe* v. *Corporation of London*, 1 Y. & C. C. C. 631; *Marquis of Bute* v. *Glamorganshire Canal Company*, 1 Phill. 681; *Harris* v. *Harris*, 4 Hare, 179; *Flight* v. *Robinson*, 8 Beav. 22.

With reference to privileged communications, it is to be observed, that in order to be protected, the denial must be specific, so as to exclude any intendment as to the relevancy of the particular documents to the plaintiff's case; thus, where a defendant in his answer ignored a fact save as might appear in his answer or by documents in the schedule, no document in the schedule was exempted from production though the answer as to some positively stated that they were privileged communications: *M'Intosh* v. *The Great Western Railway*, 1 Mac. & Gor. 73.

The case of *Floyer* v. *Sydenham* serves to illustrate the principle embodied in the second proposition, which has long obtained, and may be said to be one of the most firmly established rules as regards the right to discovery. It is based upon, and flows as a corollary from, that rule, which declares that a party impugning another's title, and seeking to establish his own in the place of the one impugned, must rely on the strength of his own title, and not on the infirmity of his adversary's: *Jerrard* v. *Saunders*, 2 Ves. jun. 458. In the case of *Floyer* v. *Sydenham*, it must be carefully borne in mind that the discovery was not given to the plaintiff quâ heir, but quâ purchaser under the settlement. Claiming under the entail, he had a right to a discovery of all facts, deeds, and documents necessary or material to his own title, or that under which he claimed. The rule as laid down in this case was subsequently recognised by Lord *Loughborough*, who said that an heir in tail had, beyond the general right, such an interest in the deed creating the entail, that the Court, as against the person holding back the deed, would compel the production of it; *Lady Shaftesbury* v. *Arrowsmith*, 4 Ves. 66; but an heir, claiming as such simply against a devisee, has no such right: *Crow* v. *Tyrrell*, 3 Madd. 179. For, as observed by Lord *Loughborough*, "All the family deeds together would not make his title better or worse; if

he cannot set aside the will, he has nothing to do with the deeds: a will established is an answer to an heir at law. . . . . Permitting a general sweeping survey into all the deeds of the family would be attended with very great danger and mischief, and when the person claims as heir of the body it has been very properly stated that it may show a title in another person if the entail is not well barred:" 4 Ves. 70, 71; and see, also, *Bennett* v. *Glossop*, 3 Hare, 578. A devisee however is, beyond all doubt, entitled as against the heir at law to a discovery of deeds relating to the estate devised, otherwise the heir might defend himself at law by setting up prior incumbrances, and thus prevent a trial of the validity of the will: *Duchess of Newcastle* v. *Pelham*, 3 Bro. P. C. 460, Toml. ed. Lord *Brougham*; in the case of *Bolton* v. *Corporation of Liverpool*, 1 Myl. & K. 91, states the principle to be, "that a party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with the support of his own title, and which form part of his adversary's; he cannot call for those which, instead of supporting his own title, defeat it by entitling his adversary. Those under which both claim he may, or those under which he alone claims." Equity will only remove any impediments, and thus facilitate the assertion of a legal title; but such impediments must be expressly stated to exist: *Stansbury* v. *Arkwright*, 6 Sim. 481. A vague general charge of fraud will not be sufficient to prevent a demurrer to the discovery required; the precise nature and circumstances of the fraud must be specifically charged to constitute a ground for equitable interference: *Munday* v. *Knight*, 3 Hare, 497. It is essential that a plaintiff should have a clear title to, or interest in, the discovery he seeks, whether in aid of his proceedings at law, or with reference to consequential relief in equity. The title must be, or at least must be alleged to be, in the plaintiff, otherwise the bill would be a mere fishing bill: *Ivy* v. *Kekewich*, 2 Ves. jun. 679; and be liable as such to demurrer. And if the discovery can be enforced in another tribunal, where it is alleged to be required, a Court of equity would not entertain the bill: *Dun* v. *Coates*, 1 Atk. 288; and such a power will be presumed to exist in the other tribunal, unless distinctly stated not to exist: see *Bent* v. *Young*, 9 Sim. 180; and if the discovery is sought as subsidiary to an action in another court, it must appear that the action has been already instituted: Ib. So strict is the rule, with respect to the interest which the plaintiff must in his bill show himself possessed of, that he can obtain no discovery distinct from the specific relief which he may have proved himself entitled to, for "he has no right at the same time to maintain a bill for

specific relief and add to that a bill for discovery on a matter which is quite distinct from that specific relief:" *Wood* v. *Hitchings*, 3 Beav. 510.

A bill of discovery cannot be filed in aid of an action brought to recover damages for a mere personal tort; in other words, a bill of discovery cannot be sustained in any case where the matter sought to be discovered may be made the subject of a criminal charge, and a demurrer, therefore, to any such bill would be allowed: *Glynn* v. *Houston*, 1 Keen, 329: and although Courts of equity compel a defendant generally to give discovery in aid of the plaintiff's case, yet, whatever the merits of the case might be, there was always a certain class of questions which the defendant was not bound to answer; as, for instance, such as would involve the disclosure of privileged communications, or such as relate to any matters the admission of which might subject him to penalties or forfeiture, and as to these it was always competent for a defendant to protect himself from discovery by answer: *Parkhurst* v. *Lowten*, 1 Mer. 400; *Earl of Lichfield* v. *Bond*, 6 Beav. 88; *Attorney-General* v. *Lucas*, 2 Hare, 566; *Cooke* v. *Turner*, 14 Sim. 218. The privilege is not extended to an outlaw, because the king is entitled to his estate by course of law, and the outlawry is in the nature of a gift to the king or a judgment for him, and a common person may have a bill of discovery in the like case to entitle him to take out execution: 6 Bac. Abr. 65, citing *The Protector* v. *Lord Lumley*, Hardr. 22. Where a plaintiff is alone entitled to the penalties, and expressly waives them by his bill, the defendant cannot withhold the discovery, for it can no longer subject him to a penalty: Mit. Pl. 195, 4th ed.

The rigour of the rule, as to answering fully when the defendant has undertaken to answer at all (*Rowe* v. *Teed*, 15 Ves. 372; *Somerville* v. *Mackay*, 16 Ves. 382; *Mazarredo* v. *Maitland*, 3 Madd. 66; *Lancaster* v. *Evors*, 1 Phil. 349), has been of late materially relaxed, and he may now, by the 38th order of August, 1841, decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer, although he answers other parts of the bill, from which he might have protected himself. There has been some conflict on the construction of this order, as to how far such protection may be insisted on, seriatim, to each interrogatory, where the bill is clearly demurrable: see *Tipping* v. *Clarke*, 2 Hare, 392; *Fairthorne* v. *Weston*, 3 Hare, 393; *Kaye* v. *Wall*, 4 Hare, 127; *Baddeley* v. *Curwen*, 2 Col. 151; *Molesworth* v. *Howard*, ib. 145. It has, however, been recently decided that the order in question does not justify the construction, which would virtually be extending the time

for demurring to that of answering: *Mason* v. *Wakeman*, 2 Phill. 516.

A defendant may expressly contract himself out of the privilege of not inculpating himself; see the case of *The East India Company* v. *Neave*, 5 Ves. 173; *Paxton* v. *Douglas*, 16 Ves. 239, 19 Ves. 225; *Ewing* v. *Osbaldiston*, 6 Sim. 608; *French* v. *Macale*, 2 Dr. & War. 269; or he may, by an implied contract, as that involved in the moral obligation resulting from the relationship subsisting between principal and agent, devest himself of the above privilege: thus a broker, who has acted fraudulently, cannot exempt himself from discovery on the ground that a disclosure might subject him to penalties to other parties: *Green* v. *Weaver*, 1 Sim. 404.

A defendant may, before answer, under certain circumstances, have a discovery, and inspect documents in the possession of the plaintiff, if it is essential to his defence that he should do so; as, where the plaintiff by his bill stated that he had possession of the documents, and that he intended to use them in support of his case, and offered an inspection of them: *The Princess of Wales* v. *Earl of Liverpool*, 1 Swanst. 114; *Shepherd* v. *Morris*, 1 Beav. 175; *Taylor* v. *Heming*, 4 Beav. 235; but, without such specific offer by the plaintiff, he can only be compelled to produce documents upon a cross bill: *Bate* v. *Bate*, 7 Beav. 528.

EDWARDS *v.* HEATHER.

Dec. 6, 1724.

[AT LORD CHANCELLOR'S HOUSE.]

Agreement, if unreasonable, though in part executed, not specifically decreed.

BILL was brought for specific performance of covenants. The plaintiff sold the defendant a copyhold estate of the yearly value of 16*l.* (on which was timber to the value of 150*l.*) for 630*l.*, and covenanted to surrender on or before Michaelmas then next; the defendant paid 10*s.* in part of the purchase, entered on the premises, cut down timber, stocked the land, and did everything as owner. The plaintiff proved he had given notice in writing that he would sur-

render next court-day, and attended accordingly; on the defendant's part there were several proofs, that he was disordered in his senses; and though *there be proof that the timber was of the value of 150*l.*, yet, as no custom is alleged of the tenant's having power to cut it down, it must be according to common law, by which the tenant has no power over it, and therefore a plain imposition. The Chancellor was of opinion, it was a great over-value, and that his cutting down of timber was a convincing proof of his folly, because a direct forfeiture; but as it is, it is a matter merely at law; the covenant is to surrender at or before Michaelmas; you say you were ready at the next court, which does not appear to have been before Michaelmas; if surrender had been, action would have lain at law. Bill dismissed. [* 4.]

Generally, with respect to sales at an undervalue or of eventual hardship, it may be affirmed that Courts of equity will not refuse their assistance to enforce the specific performance of a contract, simply because the price is impeachable or the bargain disastrous in its issue. "It would be calamitous that the matter should rest on such loose expressions, as hard and unconscionable," per Lord *Hardwicke*, in *Adams* v. *Weare*, 1 Bro. C. C. 567. On the contrary, equity will lend its aid to complete a contract which, in its inception, was reasonable, but which, by the effect of accident before the contract could be perfected, had become a most hard bargain upon one or other of the contracting parties; as, for instance, where a party had agreed to buy some houses, and, from a defect in the title, the contract could not be completed on the day agreed upon, and the treaty proceeded upon a proposal to waive the objections on certain terms; but, before the contract was completed, the houses were burnt down, specific performance was decreed: *Paine* v. *Meller*, 6 Ves. 349; see also *Cass* v. *Rudele*, 2 Vern. 280: or where one had, in consideration of an annuity, contracted to sell an estate, and died before any payment of the annuity had been made: *Mortimer* v. *Capper*, 1 Bro. C. C. 156; *Jackson* v. *Lever*, 3 ib. 605; *Kenney* v. *Wexham*, 6 Madd. 355; *Bower* v. *Cooper*, 2 Hare, 408; but where any preliminary condition has to be fulfilled, which from unforeseen causes cannot be performed, there Courts of equity will abstain from interfering: *Counter* v. *Macpherson*, 5 Moo.

P. C. C. 83: or where the contract has been completed, with the exception of the payment of the entire purchase-money (the remedy being obviously at law), equity will afford no relief: *Edwards* v. *Heather*. Of course fraud, if proved, will vitiate these as well as all other contracts; but mere inadequacy of price is not tantamount to fraud, nor will equity relieve any one from his engagement, if, after a full opportunity of judging for himself, he has, with his eyes open, involved himself in what turns out to be a hard bargain: *Attwood* v. *Small*, 6 Cl. & Fin. 232. And if the facts from which the evidence of fraud is to be deduced are proved to have been well known to the party desiring to be released from his bargain, such knowledge is sufficient to repel the presumption of the existence of any fraud: Ib.; and see *Vigers* v. *Pike*, 8 Cl. & Fin. 562; *Clapham* v. *Shillito*, 7 Beav. 146. A distinction, however, is to be observed between cases where a mere mistake on the part of one or other of the contracting parties is held no ground for resisting the specific performance of a contract, and the case where both parties are labouring under an erroneous impression of the actual state of circumstances affecting the contract at the time they enter into it; as where a person, being entitled to a vested reversionary interest in certain property, contracted to sell it, and being entitled also to a contingent addition thereto in a certain event which had occurred, but of which occurrence neither he nor the purchaser of his interest was aware, such a contract could not be enforced (*Colyer* v. *Clay*, 7 Beav. 188; *Carpmael* v. *Powis*, 11 Jur. 158, M. R.; sed vide *Okill* v. *Whittaker*, 1 De G. & S. 83), as supporting a somewhat different construction.

The foregoing cases suggest the consideration of one of the most important and fundamental maxims of equity; namely, that equity looks on that as done, which is agreed to be done. The doctrine embodied in this maxim may, with slight qualifications, be regarded as universal in its application to all agreements. The first qualification to which it is subject, is that equity will only consider that agreement as perfected which, in justice and conscience, ought to have been carried into execution; for wherever there is a stipulation in the contract, either against conscience (*Chesterfield* v. *Janssen*, 2 Ves. 155) or public policy (*Franco* v. *Bolton*, 3 Ves. 370; *Batty* v. *Chester*, 5 Beav. 103; *Smyth* v. *Griffin*, 13 Sim. 245), there the party seeking to enforce the contract is stopped in the very threshold of his procedure by the equally fundamental maxim, which has no exception, viz., that he who seeks equity must do equity, Courts of Chancery adopting the rule of the civil law—"Pacta quæ contra leges constitutionesque vel contra bonos mores nullam vim habere indubitati juris est." Cod. lib. 2, tit. 3, b. 6. One other qualification which affects

the rule is, that equity will only consider the agreement as perfected in favour of those parties who have a right to pray its specific performance (as, at law, a stranger to an indenture cannot join in any action for nonperformance of the covenants contained in it: *Lord Southampton* v. *Brown*, 6 B. & C. 718); but now, by the 5th sect. of the 8 & 9 Vict. c. 106, "an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture." The extension of the privilege is limited to estates or covenants respecting realty; and equity, following the law, will not recognise the right to the enforcement of a contract by a stranger; as, for instance, where a debtor has made an absolute conveyance to trustees in favour of creditors generally: *Walwyn* v. *Coutts*, 3 Mer. 707; *Garrard* v. *Lord Lauderdale*, 3 Sim. 1: or even in favour of a particular creditor: *Page* v. *Broom*, 4 Russ. 6: (which creditors are not parties or privy to the deed) he does not devest himself of the control over the property, nor is it competent for the creditors or particular creditor, in such a case, to insist on the specific appropriation of the property in accordance with the provisions of the deed: *Steel* v. *Murphy*, 3 Moo. P. C. C. 445; *Latouche* v. *Earl of Lucan*, 7 Cl. & Fin. 772; *Law* v. *Bagwell*, 4 Dr. & War. 398; *Gibbs* v. *Glamis*, 11 Sim. 584; see also *Hill* v. *Gomme*, 5 Myl. & Cr. 250: aliter, if the trustee is himself a creditor: *Wilding* v. *Richards*, 1 Col. 655. It might be otherwise if the author of the deed had communicated to the creditor the existence of the conveyance in his favour, and he had been induced to act or forbear on the faith of that communication: *Browne* v. *Cavendish*, et e contra, 1 J. & Lat. 606: but the mere announcement to the creditor of the creation of the trust in his favour will not, per se, give the creditor any lien on the trust property: *Ex parte Heywood*, 2 Rose, 355; *Malcolm* v. *Scott*, 3 Hare, 39. It was, at one time, doubted whether there was a right in the remainderman to resist the specific performance of an unfulfilled agreement for a lease entered into by the preceding tenant for life, who had the power to bind the remainderman, on the ground that the remainderman was neither party nor privy to the lease; but it was held, that although there was not an actual privity between the party resisting the contract and the party seeking its performance, yet that there was a "referable privity" under the power of leasing, under which the agreement was intended to have been concluded: *Campbell* v. *Leach*, Ambl. 740. That case was followed by the case of *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52: nor will slight infractions of the power prevent the assertion of the right as against the remainderman, if it

could have been enforced against the party whose inchoate act it is sought to consummate; as, for instance, where tenant for life, with power of leasing for twenty-one years in possession, had bound himself by a written agreement to execute a lease nearly two years before the expiration of the old one; and, having survived the expiration of the old one, died before the new lease was granted, the contract was considered as binding on the remainderman: *Dowell* v. *Dew*, 1 Y. & C. C. C. 345; S. P. *Butler* v. *Bowis*, 2 Col. 156.

Another frequent illustration of the maxim of equity under consideration is to be found in the doctrine of equitable conversion, which is thus accurately and concisely defined by Sir *Thomas Sewell* in the case of *Fletcher* v. *Ashburner*, 1 Bro. C. C. 499, "that nothing was better established than this principle, that money, directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this, in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid; whether the land is actually converted, or only agreed to be converted. The owner of the fund, or the contracting parties, may make land money, or money land." Where, however, it is sought to affix a different character, either to realty or personalty, before it has been actually converted, that character with which it is sought to impress it must have been decisively and distinctly fixed upon it by the will or deed under which the question arises: *Walker* v. *Denne*, 2 Ves. jun. 185. Nor will the conversion, even after it has been actually effected, be considered as effected out and out, where the purpose for which it was contemplated has been fulfilled without the necessity for an entire conversion: see *Amphlett* v. *Parke*, 2 Russ. & Myl. 221: so too where lands were conveyed to trustees, in trust to sell for payment of debts, and being sold after the death of the owner, it was held, as against the crown, that no part of the produce was liable to probate duty: *Matson* v. *Swift*, 8 Beav. 368. So, although realty, when partnership property, is regarded as personalty, there is no presumption in favour of the crown to entitle the latter to probate duty on the value of any real estate of a deceased trader: *Custance* v. *Bradshaw*, 4 Hare, 315. And, generally, wherever by deed or will money is directed to be vested in land, or land converted into money, and before the investment or conversion has in fact taken place, the whole interest has centred in one individual, any act of his, expressive of the character in which he regards it, will give the rule as to its devolution from him: *Cookson* v. *Reay*, 5 Beav. 22; *S. C.* 12 Cl. & Fin. 121.

EARL OF HINDFORD *v.* DECOSTA.

Dec. 10, 1724.

[AT THE LORD CHANCELLOR'S HOUSE.]

Plaintiff, after election made to proceed at law, where he fails, may revive his bill.

THE plaintiff brought a bill against the defendant for an account, and after brought assumpsit at law for part of what was included in the bill, so ordered to make election on which he would proceed; he elected going to law, and injunction as to proceeding here: on the trial at law, it appeared by the witnesses that there were accounts between them; the counsel finding they had mistaken the action, never controverted the defendant's proof, but suffered a nonsuit. So plaintiff moves to have leave to revive, which was opposed by the defendant, in regard the plaintiff had made his election.

But the Chancellor gave leave to revive, and declared, the only end of the injunction was, that he should not proceed on both together; not that choosing one, in which he miscarries, should preclude his right; it is not a favour, but ex debito justitiæ; he might bring a new bill. And is it not of justice to make the coming at right as expeditious and as little expensive as possible? For on a new bill, after much time and money spent, you would be but where you are on a bill of revivor.

The case of one *Collett* was quoted, as in point.

There is obviously an error in the report of this case, for the plaintiff having elected to proceed at law, the necessary consequence of such his election is, that "his bill in equity stands dismissed;" Harrison, Ch. Pr. 316; and after dismissal there can be no revivor.

Subject to this qualification, the case may be regarded as exemplifying the maxim, "nemo debet bis vexari, si constet curiæ quod sit pro unâ et eâdem causâ," 5 Co. 61 *a*. By the 18th of Lord Bacon's Orders (Beames' Orders, 11) "Double vexation is not to be admitted; but if the party sue for the same cause at common law and in Chancery, he is to have a day given to make his election where he will proceed; and in default of such election to be dismissed." Provided the subject-matter be the same, it does not signify where the other proceeding is instituted, whether at common law or in equity; Gilb. For. Rom. 55; or in bankruptcy: *Ex parte Prowse*, 1 G. & J. 92; *Ex parte Bernasconi*, 2 G. & J. 381; *S. C.* M. & McAr. 130; *Ex parte Flower*, 1 De Gex, 503;—in a foreign Court: *Pieters* v. *Thompson*, Coop. 294; *Booth* v. *Leycester*, 1 Keen, 579; *S. C.* 3 Myl. & Cr. 459; *Graham* v. *Maxwell*, 1 Mac. & Gor. 71.

The practice is now regulated by the 20th article of the 16th Order of May, 1845, under which no defendant can obtain the usual order of reference until eight days after the answer has been filed; but by the 51st Order of May, 1845, he may, if the plaintiff has excepted to his answer, require him to procure the Master's report on the exceptions within four days. The reference, for the purpose of ascertaining whether the two proceedings are identical, will not be made before an answer has been filed; for until then the defendant cannot be said to be doubly vexed; *Tillotson* v. *Ganson*, 1 Vern. 103; *Jones* v. *Earl of Strafford*, 3 P. Wms. 90; nor can it be applied for if the answer is excepted to; *Browne* v. *Poyntz*, 3 Madd. 24; for an insufficient answer is no answer; *Bishton* v. *Birch*, 1 V. & B. 366; nor if the plaintiff has amended his bill after answer, and before the time for excepting to the answer of such amended bill has expired: *Leicester* v. *Leicester*, 10 Sim. 87. Lord *Eldon* was of opinion that the order of reference implied an order to stay all proceedings, whether it be asked for or not; *Amory* v. *Brodrick*, Jac. 530; though this rule was doubted in *Fennings* v. *Humphery*, 4 Beav. 1, which decided that where an order to elect was served upon the plaintiff, yet if that order was shown to have been irregularly obtained, he would be precluded from applying to discharge such order, although he might have taken a step in the action at law after service of the order to elect. The Court however may, and often does, modify the rule according to the particular circumstances of each case; *Carwick* v. *Young*, 2 Swanst. 239; as, in *Barker* v. *Dumeres*, Barn. 277, the plaintiff was permitted to proceed at law to recover judgment with a stay of execution, and also to proceed in equity for an account.

The apparent exceptions, which are not in fact exceptions to this

rule, are first, where a mortgagee is allowed to proceed for the recovery of his debt by a bill of foreclosure in equity, and an action on the bond or covenant of the mortgagor at law; *Booth* v. *Booth*, 2 Atk. 343; and, secondly, where a man proceeds at law in ejectment for the land, and in equity for an account of the mesne profits, as he can only recover damages at law from the time of the entry laid in the declaration: *Anon.* 1 Vern. 105. In the former case the double proceeding is by virtue of contract, in the latter by reason of the necessity of the thing.

LIMAX ———.

On confirming jointure, all deeds relating to the inheritance to be delivered up to the heir.

MOTION made, that on confirming a jointure all deeds, and leases, and writings relating to the inheritance, should be delivered; which was opposed as to the leases; because without them the jointress could not recover the *rents; [* 5] and though the leases may be expired, there may be arrears of rent and covenants.

But all deeds and writings, and expired leases, were ordered to be delivered up, unless particular reason be shown to the contrary by next seal.

The Master certified that writings were not delivered in; the clerk offered to prove they were delivered in, but would not suffer averment against the Master's certificate. Master's Certificate.

It is a well-established rule with reference to the custody of title deeds, where several persons are interested successively in the same estate, that the tenant for life is entitled to the muniments of the property: *Duncombe* v. *Mayer*, 8 Ves. 320. The case of the jointress appears to be an exception; she is, however, regarded as a purchaser without notice (see *Harvy* v. *Woodhouse*, post, 80); and as such is protected in a Court of equity from the discovery of any documents affecting her jointure, unless the party seeking the discovery can and does confirm her jointure: *Earl of Portsmouth* v. *Lady*

Suffolk, 1 Ves. 30. The mere offer to confirm her jointure is insufficient; the confirmation must be actually made, otherwise, after the discovery, her rights might be defeated by a paramount title, and the offer rendered wholly nugatory: *Leech* v. *Trollop*, 2 Ves. 662. The principle upon which the discovery is enforced is somewhat analogous to that on which the heir of the husband may plead the detainment of charters to a writ of dower; for "the charters are the sinews of the inheritance of the husband's heir, and she is not worthy to demand her dower of the husband's inheritance who will wrongfully detain from his heir (by whom she is to be endowed) the muniments which defend the said inheritance:" *Anne Bedingfield's case*, 9 Rep. 17 *b*. The same reasoning would appear not to apply to a tenant by the curtesy, at least if he has handed them over to third parties: *Ford* v. *Peering*. 1 Ves. jun. 76. Of course, if there is evidence that the tenant for life is destroying the deeds, in order to better or enlarge his estate, the Court would take care to put the deeds out of his power, and secure the interests of those in remainder: *Pyncent* v. *Pyncent*, 3 Atk. 571; *Noel* v. *Ward*, 1 Madd. 330.

Monday, Jan. 4, 1724.

MEMORANDUM. This day *Thomas Parker*, Earl of *Macclesfield*, resigned the seals; and his Honour the *Master of the Rolls*, viz. Sir *Joseph Jekyl*, Sir *Robert Raymond*, one of the Justices of the King's Bench, and Mr. Baron *Gilbert*, were made Commissioners to execute the office of Chancellor.

SIR JOHN FRYAR, KNT. *v.* MARY VERNON, SPINSTER.

De Term. Sanct. Hil. Anno 11 *Geo. I.* 1724.

[BEFORE THE COMMISSIONERS OF THE GREAT SEAL.]

Ireland. No particular sequestration to go there, or to the Plantations.

MOTION was made for a particular sequestration against the defendant's lands in Ireland, she having stood out the process of contempt here; and relied on the case of *Hamilton* and *Pollard* in July or October last, where, on like motion for a particular sequestration to North Carolina, the Chancellor said, *it might be right, but the method should be well considered, as its being to be a precedent; and inclined it should be to sequestrators. [* 6]

But the Register, on being asked, said, that sequestration never went.

MASTER OF THE ROLLS.—What leads you into this motion was the case of the *Earl of Arglasse* v. *Muschamp*, where it was denied by the Court; but after application was made to the King, and a letter was sent to the Governor of Ireland, but never heard of anything else of that sort; it would be very odd that the process of this Court should have anything to assist it. I remember that a bill was brought into Parliament to extend judgments to the plantations; but it was rejected; but as to the plantations, it is particularly odd, as it affects the King's sovereignty in council over them: But what makes it clear to demonstration that it should not go, is this, where a defendant to a bill, whose usual residence is in Ireland, happens 1 Vern. 75.

to be here, he is obliged to give security; which makes it plain he is not amenable to this Court; for if he was, that precaution would be unnecessary.

So particular sequestration denied, but a general one of course granted.

The jurisdiction of the Court of Chancery is most comprehensive when its power is invoked against the conscience of a person resident within its jurisdiction. "The Courts do agere in personam, and may by compulsion of the person and process of the Court compel him to do justice:" *Foster* v. *Vassall*, 3 Atk. 589. By its process against the *person* all contracts relating to realty or personalty, as well within as without its jurisdiction, are enforced: *Toller* v. *Carteret*, 2 Vern. 494; *Earl of Athol* v. *Earl of Derby*, 1 Ch. Ca. 221; *Penn* v. *Lord Baltimore*, 1 Ves. 444; *Lord Cranstown* v. *Johnston*, 3 Ves. 170; *Jackson* v. *Petrie*, 10 Ves. 164; *White* v. *Hall*, 12 Ves. 321; *The Skinners Company* v. *The Irish Society*, 7 Beav. 593; *Tulloch* v. *Hartley*, 1 Y. & C. C. C. 114. Where, however, the relief to be obtained is of a character requiring the direct agency of the Court, and both the person and the subject-matter of the suit are beyond its jurisdiction, as for instance, to make a partition of lands in a foreign country, such a suit cannot be sustained, as it would be extra vires of the Court of Chancery here to issue a commission for that purpose into the foreign country, and the commission is the only mode by which the Court, in this country, proceeds in such cases: *Cartwright* v. *Pettus*, 2 Ch. Ca. 214. On an analogous principle it is that a writ of sequestration, which originally was a process after decree, and limited to the purpose of sequestering the subject-matter of the suit only; 3 Bl. Com. 444; *Earl of Kildare* v. *Eustace*, 1 Vern. 419; is powerless in any country beyond its jurisdiction: *Fryar* v. *Vernon*, and see *Roberdeau* v. *Rous*, 1 Atk. 543; *Carteret* v. *Petty*, 2 Swanst. 323.

SNAPE *v.* FURDON.

Feb. 6, 1724.

Where a plaintiff has a decree nisi, and does not appear, bill will be dismissed with costs.

A DECREE was for the plaintiff, nisi, who now does not appear.

Master of the Rolls looked upon it as a giving up of the judgment. Bill must be dismissed with costs.

By the 44th of the Orders of August, 1841, decrees nisi are abolished, so that the case of *Snape* v. *Furdon* is now of no practical use. Before 1841, the default of a defendant, in not appearing to show cause why the order nisi previously obtained by the plaintiff should not be made absolute, enabled the plaintiff upon proof of service of the subpœna to hear judgment, and upon reading the formal words at the commencement of the answer to obtain any decree to which he conceived himself entitled, and as no evidence was entered as read upon taking such a decree (except in a case where the bill was to establish a will against an heir-at-law, *Stubbs* v. ———, 10 Ves. 30), the defendant could only appeal on matter of form; but now, though where a defendant makes default at the hearing of a cause the decree shall be absolute in the first instance without giving him a day to show cause, and though he is deprived of the advantage of the conditional order, yet he has the assurance that the plaintiff cannot steal a march upon him without at least satisfying the Court of the justice of his the plaintiff's case, he being no longer entitled to take such a decree as he can abide by. See *Evans* v. *Williams*, 6 Beav. 118; see also *Hayes* v. *Brierley*, 3 Dr. & War. 274.

[* 7]

*DEWS *v.* BRANDT.

De Term. Paschæ, April 17, 1725.

[RAYMOND, GILBERT, COMMISSIONERS.]

*Bill brought by an heir, to be relieved against articles entered into by him for the sale of a reversion, for a sum of money to be paid with interest when he came into possession.**

*Qu. dismissed.

BILL was brought to be relieved against articles. Father was tenant for life, remainder to the son in tail, remainder to the father in fee, of an estate of 371*l.* 16*s.* 4*d.* per annum, computed worth 7000*l.* The son being thirty years of age, in the life of the father, entered into articles to sell the estate for 3300*l.* to be paid when he came into possession of the estate, together with interest for the same from the time of the articles to the time when he should be in possession.

The father dies within two years after the agreement made, so that the interest amounted but to a small sum. The son, on his coming into possession, completed his agreement, and now brought bill to be relieved.

On behalf of the plaintiff was insisted the great overvalue; and that if the defendant was paid his money with interest, he could be at no loss, nor sustain any prejudice; and that sons in necessity, in the life of their ancestors, should not have that necessity made use of to defraud and impose on them; and that the father died soon after the agreement.

On the other hand it was said, there was no fraud or imposition proved, and therefore not to be presumed; if it was a fraud, it should be singly considered under that head; and if such there were, would be relieved; but to take it

in the latitude that is insisted on the other side, it would destroy all sales of reversions, and put it out of the power of a person who had a future interest to provide for his *own present occasions; so that a man might starve for the benefit of his family. And as by the law a man might sell such an estate, it would be very hard, that equity should take away from an honest purchaser what he had purchased under the sanction of law, without any equitable circumstances to defeat what he had so done; and that there was great difference between defeating an agreement and carrying it into execution; in the one case it is asking a favour, in the other merely insisting on a right; and the case of *Barney* v. *Pitt*, 2 Ch. Ca. 137, and *Twisleton* v. *Griffith*, July, 1716, were cited. [* 8]

Barney v. *Pitt*, 2 Ch. Ca. 137. *Twisleton* v. *Griffith*, 1716.

RAYMOND and GILBERT.—Had the bargain been to have paid down 3300*l.* when he came into the possession of the estate; this would not have really been a purchase of the reversion, but of an estate in possession, as the payment and possession were to be at the same time; and in that case, on account of the great over-value would relieve. Had the bargain been to pay so much down in present money, undoubtedly it had been good; else there is an end of all sales of reversions; and a man would be tantalized with having an estate of which he could make no use. But this is very different, for here is interest to be paid till it comes in possession; and it really is the same as buying the reversion for present money paid, and will be considered as so much money put out to interest by himself; the same as if he had immediately received it, and lent it to the vendee on interest; the interest might have run up to the value of the estate; it has happened otherwise, which was a chance on both sides; and is it consistent with common sense, that a present agreement should be varied by future accidents? They must be considered as they are in themselves, without anything extrinsic.

Bargains for sales of reversionary estates by heirs are never set aside, but on account of prodigality; here is nothing of that, but the reverse; for it appears both the father and he were in bad circumstances.

Certainly no rule has ever obtained, that an heir shall

not dispose of the reversion; that would be, that an heir should never be of age.

Besides, there is great difference between establishing and rescinding an agreement.

There have been some contradictory decisions upon the subject of dealings with expectant heirs and reversioners. It has been laid down that all dealings, as well with reversioners as with mere expectant heirs, are on the same footing; and that the purchaser must in both cases show that the full value has been given for the purchase. *Gowland* v. *De Faria*, 17 Ves. 20. But an examination into the later authorities will prove that neither of these propositions is tenable. In the case of *Headen* v. *Rosher*, M'Cle. & Yo. 89, L. C. B. *Alexander* expressly dissented from the doctrine in *Gowland* v. *De Faria*; see also *Earl of Aldborough* v. *Trye*, 7 Cl. & Fin. 436. It is undoubtedly true that a purchase at a gross undervalue is a transaction which, to be abiding, must be satisfactorily explained; but, as observed by Lord *Hardwicke*, in the case of *Willis* v. *Jernegan*, 2 Atk. 251, "It is not sufficient to set aside an agreement in this Court to suggest weakness and indiscretion in one of the parties who has engaged in it; for, supposing it to be in fact a very hard and unconscionable bargain, if a person will enter into it with his eyes open equity will not relieve him upon this footing only, unless he can show fraud in the party contracting with him, or some undue means made use of to draw him into such an agreement." If the principle upon which the protection is in equity afforded to expectant heirs is investigated, it will be found that it does not exist in the case of reversioners: the chief ground for the jealous interference of equity, where expectant heirs have concluded improvident bargains, is, that any dealing with them, without the privity of the person from whom the "spes successionis" is entertained, is a fraud upon that person whose bounty is thus secretly diverted from its purpose; *Gwynne* v. *Heaton*, 1 Bro. C. C. 1; *Peacock* v. *Evans*, 16 Ves. 512; *Earl of Portmore* v. *Taylor*, 4 Sim. 182; *King* v. *Hamlet*, 4 Sim. 223; *S. C.* 2 Myl. & K. 473; an ingredient which cannot enter into the consideration of a dealing with the vested interest of a reversioner: "is it consistent with common sense that a present agreement should be varied by future accidents?" *Dews* v. *Brandt*. This distinction between expectant heirs and reversioners was adverted to by Sir *John Leach*, in the case of *Wood* v. *Abrey*, 3 Madd. 417, where a tenant for life and remainderman entered into

a contract for the sale of their estate at a grossly inadequate price, and it appearing that both of them were in distress, and that the only professional adviser was the defendant's attorney, the contract was set aside; but Sir *J. Leach* observed that the policy of the rule which had obtained as to reversions might be doubted, and that if the cases were looked into it might be found that the rule was originally referred only to expectant heirs and not to reversioners. But in neither case can the rule (that the purchaser must show that he has given the full value for the expectancy or reversion) apply, where the sale sought to be impeached has been had at public auction, and without fraud. Thus, in the case of *Shelly* v. *Nash*, 3 Madd. 232, a bill to set aside a sale of a reversion, which had been disposed of by public auction, was dismissed with costs; though it was shown that the full value was not given by the purchaser, the principle, with reference to sales by public auction, being that the sum which the thing will fetch is the sum which the thing is worth. In *Hincksman* v. *Smith*, 3 Russ. 433, the relief was given to a person, not only because he was ignorant of his rights and had parted with his reversionary interest at an undervalue, but because, as in *Wood* v. *Abrey*, he was solely dependant on the vendee's solicitor for professional aid. Although it has ever been considered a suspicious circumstance, and a badge of fraud, that the vendor should only have the assistance of the purchaser's professional adviser, yet, where the sale is by a tenant for life and remainderman, there is no rule which requires that they should be represented by separate solicitors: see *Cooke* v. *Burtchaell*, 2 Dr. & War. 165. In *Newton* v. *Hunt*, 5 Sim. 511, the reversioner was relieved, but on the ground of fraud. So, in the case of *Addis* v. *Campbell*, 4 Beav. 401, fraud on the part of the purchaser was the ground of relief against a sub-purchaser with notice. See also, *Davies* v. *Cooper*, 5 Myl. & Cr. 270; *Edwards* v. *Browne*, 2 Col. 100. However fluctuating the principles may be said to have been, with respect to the amount of protection extended by Courts of equity to expectant heirs and reversioners, it may now be considered as settled that in neither case is it necessary for the party whose contract is impugned to show that he gave the full value: *Earl of Aldborough* v. *Trye*, 7 Cl. & Fin. 436; or, as L. C. B. *Alexander* styled it, "the dry arithmetical value:" *Headen* v. *Rosher*, M'Cle. & Yo. 89; and see *Potts* v. *Curtis*, You. 543.

Where a purchase has been made under a decree of the Court of Chancery, there appears to be some conflict of authority as to the precise period when the contract is to be pronounced complete—whether from the date of the bidding or from the day of the confirmation of the Master's report. Lord *Eldon* in the case of *Ex parte Minor*, 11 Ves. 559, decreed com-

pensation to a purchaser in respect of a loss by fire, which occurred in the interval between the date of the bidding and the confirmation of the Master's report; and in the case of *Twigg* v. *Fifield*, 13 Ves. 517, Lord *Eldon* considered the purchaser as having the purchase from the confirmation of the report; and, in accordance with this doctrine, Lord *Plunket* held that the purchaser of an estate pur autre vie ought to be discharged from his purchase, by reason of the lapse of the life before the report was confirmed (*Vincent* v. *Going*, 3 Dr. & War. 75, in notis); but Sir *E. Sugden*, in the case of *Vesey* v. *Elwood*, 3 Dr. & War. 74, decided that the purchaser of an estate pur autre vie ought not to be discharged from his purchase by reason of the lapse, observing, "That the Court may disturb the purchaser, and he buys subject to that risk. But he has no option. He must complete his purchase, unless the biddings are opened, and has no corresponding right to be relieved from the purchase." And he relied on the dictum of Lord *Eldon* in *Anson* v. *Towgood*, 1 J. & W. 637. "Could anything turn upon the report not being confirmed?" But the observation of his lordship was secundum subjectam materiem, and the only question mooted was whether the purchaser of a life interest in stock was entitled to the dividend accruing due after the bidding, but before the confirmation of the report, the life being in esse, and the biddings not attempted to be opened. In the late case of *Templer* v. *Sweet*, 8 Beav. 464, Lord *Langdale* said he had made inquiries, and ascertained that in cases where the purchaser of real estate, under the decree of the Court, dies before confirmation of the report, and the biddings are opened, it is not the practice of the Court to require service on the heir of the purchaser; the inference from which is rather opposed to the view of Sir *E. Sugden*, whose judgment in this particular certainly militates against one of the first principles of equity, viz., that of mutuality. Why should the purchaser be bound and the seller loose? Or, as it was aptly expressed by Sir *Knight Bruce*, in the case of *Seaton* v. *Mapp*, 2 Col. 564, "why should the purchaser be held by a cable, and the vendors by a skein of silk?"

The doctrine of mutuality is embraced in this single proposition, viz., that Courts of equity will not decree specific performance of any contract where the remedy is not mutual; "each party must have an equal right, and power to compel a performance," *Lawrenson* v. *Butler*, 1 Sch. & Lef. 13: thus an infant cannot sustain a suit for the specific performance of an agreement, *Flight* v. *Bolland*, 4 Russ. 298; and the reason is obvious, because specific performance cannot be decreed against him, Co. Lit. 2 *b*. On the same principle a receiver-general of the revenues of the see of Ely, who had been appointed to the office by a previous bishop, and discharged

its duties under three successive bishops, was held not entitled to have it declared, on the accession of a fourth bishop, that he should confirm him in the office in question, and simply because the bishop could not enforce his services: *Pickering* v. *Bishop of Ely*, 2 Y. & C. C. C. 249. Thus too a remainderman in tail could not enforce the specific performance of an agreement for a lease which the tenant for life had made; but which in some respects was ultra vires, inasmuch as he (the tenant in tail) would not have been concluded by the contract of his predecessor at the suit of the lessee, *Ricketts* v. *Bell*, 1 De G. & S. 335; aliter, if the lease had been within the scope of his predecessor's authority: see *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52. A further illustration of the doctrine under consideration will be found in a recent case, where the executors of a deceased partner filed a bill for the dissolution of the partnership against the surviving partner, notwithstanding the period had not elapsed within which the deed constituting the partnership had in the most stringent manner provided for its continuance: *Downs* v. *Collins*, 6 Hare, 418. Where, however, the party resisting the specific performance rests his refusal on grounds which would render him obnoxious to the equally inflexible rule in equity, that a person shall not be permitted to avail himself of his own wrong, there his inability to fulfil the whole contract at the time of entering into it shall not prevent its enforcement to the extent of his capacity: *Pigot's case*, 11 Co. 27 *b*.

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*FINCKLE *v.* STACY, EXECUTOR OF STACY. [* 9]

April 27, 1725.

[JEKYL AND GILBERT.]

Two persons join in doing a particular work, one of whom refused to join in a suit to recover what was due; the other got his moiety; he will not be obliged to pay half of that moiety to the other.

JOINT articles were entered into for the doing a particular piece of work for the late Duke of Marlborough, on account of which several sums of money had been jointly received by them, and immediately divided between them; there

being a sum demanded by them in arrear, which the Duke refused to pay, as being unreasonable, Stacy applied to Finckle to join with him in a suit to recover what was in arrear, which he refused to do, declaring he had several advantageous works under the Duke which he should lose, should he join in a suit; on which Stacy applied, and got his own half of the money which was due to them two. Bill is now brought for a moiety of the money so received; and insisted, it should be considered as a partnership in trade, and this money as so much received on the joint account.

But the Court were of opinion, it was not to be considered as a partnership, but only an agreement to do a particular act, between which there is great difference; and that it is so is plain, for the money which they had received they immediately divided, and did not lay out on a common account. It is pretty extraordinary, that he should come here to have the benefit of another's act in which he refused to join; which refusal was with a corrupt view for his own advantage, and not on the common account, the money due on which he would rather sacrifice, than forego his own particular advantage; and here is no insolvency in the Duke, if there had, perhaps had deserved consideration.

Bill dismissed with costs.

The definition of partnership, according to *Tindal*, C. J., is "a mutual participation in profit and loss:" *Green* v. *Beesely*, 2 Bing. N. C. 112. If the grounds of the plaintiff's claim, in the case of *Finckle* v. *Stacy*, be examined with regard to the above definition, it will be seen that they are not such as would warrant him in filing his bill for a proportion of the sum which the defendant had recovered: on the contrary, after the plaintiff had refused to co-operate in the recovery of the amount due to both, he would clearly be excluded on every principle of justice and equity from any participation in the profit which the defendant had secured at his own hazard. On a similar principle it is that Courts of equity will never suffer a party to lie by, and after great expense has been incurred without any interfer-

ence on his part, when such expenditure shall prove profitable, to set up a claim which his strict legal rights might have obtained for him, if preferred before. Lord *Brougham*, in the case of *Parrott* v. *Palmer*, 3 Myl. & K. 643, says, "Shall a party stand by, and see others laying out their money for thirty or forty years upon works, without giving them any warning at all—see all this, and say nothing—look on, and make no sign; while perhaps the trade is a doubtful or losing concern; and then, when the speculation has proved successful, come for an account, that is, a share of the profits? By no means." And, in accordance with this doctrine, the Vice-Chancellor *Knight Bruce* decided, that where the directors of a company had resolved to declare the shares of an individual member of the concern conditionally forfeited, and their decision might have been relieved against in equity if called in question within a reasonable time, yet if the circumstances of the concern were at the time such as to have presumably been the cause of the individual member not remonstrating against the forfeiture, he should not, when the concern became prosperous, be permitted to participate in the profits or even to question the legality of the forfeiture: *Prendergast* v. *Turton*, 1 Y. & C. C. C. 98, affirmed by Lord *Lyndhurst*, 18th November, 1843.

ORD *v.* SMITH.

April 28, 1725.

[SAME LORD COMMISSIONERS.]

Mortgage made to be redeemed with the mortgagor's own money; this, as a designed fraud, will let the mortgage be redeemed after the usual time prescribed for redemption by the rules of the Court.

A PERSON mortgaged his estate for a small sum of money in the year 1679, by an absolute conveyance and a defeasance, with these clauses in it, "That it should be redeemed with the party's own money, and in his lifetime." The mortgagor's necessities soon after forced him to go abroad; where he died about twenty-seven years ago, and his heirs knew nothing of the mortgage. In 1702 the mortgagee made his will, and devised, that in case the

[* 10] mort*gage should be redeemed, the money to go so and so. Sixteen years after the will, the bill for redemption was filed; in opposition to which the great length of time was insisted on, and that by the now settled rule of the Court, a mortgage shall not be redeemed after twenty years.

MASTER OF THE ROLLS.—If a redemption be decreed, shall do no wrong, nor put the party to any difficulty, for he will have a rate of interest more than the law now allows: but if we do not decree a redemption, shall establish a very great imposition.

Absolute conveyances and defeasances were formerly much used as mortgages, but left off on account of being more dangerous, by losing the defeasance, than the way now in use, where the defeasance is in the same deed. As the money was to be repaid, let the words in the defeasance be ever so much fettered, they all signify nothing; for the borrower is under some necessities, and therefore in the power of the lender, and on that account the law makes a benign construction in his favour. But this was a fraud in its creation, and no limitation of time in redemption against that; for to what other purpose could the words, "to be paid with his own money," be thrown in, if not to make the mortgagor imagine it could be done no otherwise, for any other person's money was of equal value: *Lord Warrington* v. *Booth.*

Floyer v. *Lovington.*

But if singly considered, distinct from the fraud, there is sufficient for redemption, by the declaration of the will, where he calls it a mortgage. I remember a case about twenty years ago, where a redemption was decreed on a mortgage made 1642, where there was neither infancy nor outer mere: the mortgagee brought a bill to foreclose, and by his so doing, it was an admission that he considered it as a mortgage; so the mortgagor was let in to redeem.

In the case of *Stuckvile* and *Dolben* there was a foreclosure; the mortgagee after in his will disposes of the money on the mortgage; on this admission in the will, bill was brought to open it; the Court took time to consider of it, and after the parties agreed.

By these fettering clauses, he was by the act of the mort-

gagee persuaded he could not redeem; and for that reason, as the mortgagor by that deception would have a right to redeem, so will his heir, who would thereby be as much deceived by them as he; but here it appears, the heir did not at all know of this deed, which is something superadded, and à fortiori; and if he had known of it, he would have * been thereby deceived, and led into an imagination that he could not redeem the estate. [*11.]

Baron Gilbert.—The rule for redemption, if it be for twenty years, should be inviolably abided by, for it is for the quiet of men's estates; so long a space of time neglecting to pursue their rights, is a dereliction of the pledge, and should not be broke into: for it is natural reason to think, that persons, who had a right, in such a space of time, would have pursued it, if it was thought worth while; and by its not being done, as it was their interest so to do, (about which men are very sedulous,) the natural deduction is, that they did not think it worth while. But a case may be out of the general rule; as where the supposal of a dereliction may be answered; which dereliction ever supposes previous knowledge of the right, for it is absurd to say a man relinquishes a right which he knows not of.

The right of redemption is here industriously obscured by particular clauses, which would be useless for any other purposes, but to create an imagination, that he could not do it unless with his own money, and in his life. By the will in 1702 he has devised, that if the mortgage be redeemed, the money to be to such and such purposes; so that if it was not originally fraudulent, he by the will has made it redeemable; this is out of the rule of dereliction, for there is great over-value, which for that reason cannot be supposed a dereliction, and neglected or disregarded.

So redemption decreed.

Foreclosure and redemption are respectively incident to every mortgage transaction; but by agreement, either party may deprive himself of the rights and remedies legally or equitably incident to his

estate, for "modus et conventio vincunt legem."

The distinction between a mortgage and a conditional sale is sometimes very nice, *Sevier* v. *Greenway*, 19 Ves. 413; and in the endeavour to measure out justice, the Court may almost be said to have regarded the intention of the contracting parties rather than the strict import of the assurance: see *Bulwer* v. *Astley*, 1 Phill. 422; *Belcher* v. *Vardon*, 2 Coll. 162: and evidence is admissible to explain such intention: *Walker* v. *Walker*, 2 Atk. 98; *Joynes* v. *Statham*; 3 Atk. 388. But the remedies belonging to a mortgage cannot be asserted, where the security affords no evidence that the contract was of such a nature; thus where an estate, chargeable with a certain sum, had been conveyed to a party with a power of sale, if the charge were not paid, he could not resort to a foreclosure, because the transaction was clearly not a mortgage: *Sampson* v. *Pattison*, 1 Hare, 533: but if there is an actual mortgage, albeit the deed should contain a power of sale, the mortgagee will not be thereby precluded from asserting his right to foreclosure: *Slade* v. *Rigg*, 3 Hare, 35. Where a policy of insurance on the life of the mortgagor was assigned on trust, first to pay the expenses of the trust, and then the debt, and the residue for the benefit of the mortgagor, no sale could be effected in the lifetime of the mortgagor; *Dyson* v. *Morris*, 1 Hare, 413.

Where the owner of a reversionary estate of inheritance, being indebted in the sum of 1000*l.*, demised the property to the creditor for a term of 500 years, with a proviso for cesser on payment of principal and interest, and covenanted to pay the principal sum on demand, and further, until payment, that the creditor might enter, hold, and enjoy the premises; this was in the nature of a Welsh mortgage, and a bill of foreclosure could not be sustained: *Teulon* v. *Curtis*, 1 You. 610: but a Welsh mortgage will not be presumed: *Balfe* v. *Lord*, 2 Dr. & War. 480. In a recent case where a mortgage deed contained the usual proviso for the estate to become absolute, if the principal, interest, and chief rents were not paid on a certain day, the mortgagee was restrained from foreclosing, though the interest was in arrear and the chief rents had not been duly paid, because he had covenanted not to call in the principal money during the life of the mortgagor, and as it was not competent for him to foreclose in respect of the principal so he could not in respect of the interest which accrued before the principal sum became payable: *Burrowes* v. *Molloy*, 2 Jo. & Lat. 521.

Fraud will vitiate any contract. If fetters are laid upon the right of redemption with a fraudulent design to get an estate, it will not avail: *Mellor* v. *Lees*, 2 Atk. 494. Thus in *Ord* v. *Smith* the presence of fraud was inferred because the right of redemption being to be exercised

"with the party's own money" was "industriously obscured." So, a proviso that a mortgagor or the heirs male of his body should alone be entitled to redeem was held to be inoperative, and a redemption at the suit of a jointress was decreed, the Court holding, that an estate cannot at one time be a mortgage and at another cease to be so by one and the same deed: *Howard* v. *Harris*, 1 Vern. 33. The same doctrine has been extended to the case where the redemption had to be wrought out by evidence from two deeds: *Manlove* v. *Bale*, 2 Vern. 84. And so, where the ancestor of A. having borrowed 200*l.* of B., and mortgaged certain lands for securing repayment, and having at the same time entered into a bond, conditioned that if the 200*l.* should not be paid at the day named, then if B. should pay a further sum in full for the purchase of the premises, the bond should be void, redemption was decreed in favour of A. (though the time had elapsed), the Court making no doubt that the transaction was not an absolute conveyance: *Willett* v. *Winnell*, 1 Vern. 488. In such cases, although the indulgent practice of the Courts of equity had given rise to the maxim, "Once a mortgage always a mortgage," yet this doctrine must be accepted with some modification, for if the intention to make a conditional sale and not a mortgage is apparent on the face of the transaction, there a bill to redeem will be dismissed; as where the instrument contained a stipulation that there should be a right to repurchase the lands conveyed within a definite time (which had expired), this reservation was held insufficient to convert the transaction into one of loan: *Davis* v. *Thomas*, 1 Russ. & Myl. 506.

The absence of any engagement to repay the advance has been held to form a material circumstance in determining a transaction to have been a sale; see the recent case of *Perry* v. *Meddowcroft*, 4 Beav. 197: and even where there was an engagement to repay the money, yet when the sum advanced was very nearly the equivalent for the estate, the Lord Chancellor, reversing the Vice-Chancellor's judgment in *Williams* v. *Owen*, 10 Sim. 386, refused redemption, after the time specified for the repayment had expired.

By the operation of the 3 & 4 Will. 4, c. 27, s. 28, a mortgagor is absolutely barred after twenty years from the time the mortgagee takes possession, or from the time of the last written acknowledgment by the mortgagee in possession. An acknowledgment by the mortgagee, in a letter, written to the grandfather of an infant entitled to the equity of redemption, was held sufficient to let in such infant to redeem at any time within twenty years from the date of the letter: *Trulock* v. *Robey*, 12 Sim. 402. There must, however, be a privity in the acknowledgment, re-

ferable to the party who seeks to take advantage of it; thus a recital in the deed of assignment of a mortgage, that the premises are subject to mortgage, is not such a recognition of the mortgagor's right as to prevent the assignee from availing himself of the time which had run during his assignor's possession, *Lucas* v. *Dennison*, 13 Sim. 584. The possession must be adverse, so that a mortgagee, who has bought the interest of the tenant for life of an estate in mortgage, can include no portion of time, during the existence of such tenant for life, in the computation of his period of adverse possession, as against the remainderman: *Hyde* v. *Dallaway*, 2 Hare, 528; *Burrell* v. *The Earl of Egremont*, 7 Beav. 205. In consequence of doubts as to whether foreclosure suits were within the provisions of 3 & 4 Will. 4 (see *Dearman* v. *Wyche*, 9 Sim. 570), it was enacted by 1 Vict. c. 28 that mortgagees permitting the mortgagors to remain in possession were to be barred of their remedies after twenty years from the time of the last payment of any portion of the principal or interest: see also *Wrixon* v. *Vize*, 3 Dr. & War. 104; *Du Vigier* v. *Lee*, 2 Hare, 326. Receipt of rent by an equitable mortgagee in possession is, primâ facie, such a payment as indicated by the statute, so as to keep alive his claim for any balance against the general assets of his debtor: *Brocklehurst* v. *Jessop*, 7 Sim. 438.

COX *v.* GEORGE.

April 29, 1725.

Depositions taken de bene esse shall not be published without affidavit of the party's death, and that could not be examined in chief.

MOTION, that depositions taken on a commission to examine witnesses in the original cause ex parte, in the year 1697, de bene esse, may now, on the revivor of the suit, be published.

Master of the Rolls.—They must be examined in chief after, if it be to be done: and to show that you attempted it and endeavoured it, must show an effectual prosecution for not answering; attachment is not enough, there should

be affidavits that they are dead since the examination, and that they died before they could be examined in chief, for if they could be examined in chief, their depositions cannot be read; and therefore it is *necessary to be shown they died before they could be examined. [*12.]

Before entering into the consideration of the publication of depositions generally, it may not be out of place to advert to the distinguishing features of two kinds of bills, whose sole object is to obtain and perpetuate evidence.

The close analogy between these two bills, viz. those to perpetuate testimony, and those to take testimony de bene esse, causes frequent confusion in their definition. They are, however, in their scope and characteristics essentially distinct; *the former*, are and can be brought by persons only who, having a present vested interest, or, being in possession, have no immediate injury to complain of, and who therefore cannot sue at law; —if not in possession, ejectment is the remedy, and a bill in Chancery would be demurrable: *Brandlyn* v. *Ord*, 1 Atk. 571.—*The latter* may be brought not only by persons in possession, but (as is generally the case) by persons who are out of possession, in aid of the trial at law. There is also another distinction between them, which is, that bills de bene esse can be brought only when an action is then depending, and not before; and if the bill does not allege that an action is actually depending, a demurrer will lie (*Angell* v. *Angell*, 1 Sim. & St. 83); whereas in a bill to perpetuate testimony, the plaintiff must show that the matter in question cannot be made by him the subject of present judicial investigation: Ib. In both kinds of bills the order of the Court is conditional, declaring the evidence, when taken, to be used only in the event of the death or unavoidable absence of the witness (*Mason* v. *Goodburn*, Rep. t. Finch, 391); and, as they are essentially bills of discovery, a prayer for relief would render them obnoxious to demurrer: *Rose* v. *Gannel*, 3 Atk. 439. To bills to take testimony de bene esse, there must be annexed an affidavit of the circumstances by which the evidence intended to be taken is in danger of being lost: *Angell* v. *Angell*, 1 Sim. & St. 83. In the case of *Philips* v. *Carew*, 1 P. Wms. 117, a similar affidavit was required to a bill to perpetuate testimony; but the report, which is very meagre, leads to the inference that the bill was to take testimony de bene esse. The affidavit ought to be explicit, and to state the reasons of the deponent's belief: *Hope* v. *Hope*, 3 Beav. 317.

If the witness whose evidence is to be relied on, is seventy years old, or is a soldier ordered abroad immediately, the order for his examination may be obtained ex parte: *M'Kenna* v. *Everitt*, 2 Beav. 188: or even where a witness, whose evidence is important, is about to proceed abroad: *M'Intosh* v. *Great Western Railway Company*, 1 Hare, 328. To ground an application for the publication of evidence so obtained, it is necessary to be provided with an affidavit, to show that the witness whose evidence it is proposed to publish, is not in a condition to be examined in chief: *Barnsdale* v. *Lowe*, 2 Russ. & Myl. 142. An exception, however, appears to exist in the case where a bill is filed by a devisee against the heir at law, to establish the will, in which case, after the examination of witnesses, the cause is at an end: 3 Bla. Com. 450; and publication passes as of course; *Harris* v. *Cotterell*, 3 Mer. 680. Where, however, the examination has embraced evidence relating to other matters, as deeds, moduses, or legitimacy of marriage, it is in the discretion of the Court to allow or refuse publication according to the case made: Ib. This species of evidence is permitted to be used when it can be proved, not only that the witness whose testimony it is sought to publish is physically incapable of re-examination, but where there is a moral impossibility to have the examination in chief, as where the witnesses are abroad, or where the commission cannot be executed from contempt of the commission by a foreign government: *Gason* v. *Wordsworth*, 2 Ves. 336. And if a witness is disabled by a bodily injury from attending a trial at law, an affidavit of a surgeon as to such disability would be a sufficient ground for an application to publish evidence taken de bene esse of such witness: *Andrews* v. *Palmer*, 1 Ves. & Bea. 21. But even after publication, the depositions cannot be read at law until it is proved that the witnesses cannot be examined at the trial: *Lutterell* v. *Reynell*, 1 Mod. 284. After the death of the witness, and after the expectancy has fallen into possession, publication of his testimony follows as of course, and it matters not that the deposition is intended to be used in a foreign Court, which alone can determine how far the deposition can be used: *Morris* v. *Morris*, 2 Phill. 205. The general rule where depositions taken in a suit de bene esse are required to be used in a trial at law in England, is that they be published; and it would seem that an office copy of them is sufficient evidence, at least in civil proceedings: *Att.-Gen.* v. *Ray*, 6 Beav. 335: but the Court of equity must not be supposed to give any opinion of the value or admissibility of the evidence; *Att.-Gen.* v. *Ray*, 2 Hare, 518. With respect to the publication of evidence of witnesses taken in a bill to perpetuate testi-

mony, it was observed by *Graham*, B., that the danger of publishing such depositions was very great, there being no limits as to the points to which the witnesses are to be examined, and that it was discretionary in the Court to allow publication or not, according to the case made: *Harris* v. *Cotterell*, 3 Mer. 678; and the rule is, though of course subject to exception, that an order for the publication of evidence in such cases will not be made while the witnesses are alive: *Morrison* v. *Arnold*, 19 Ves. 673; *Barnsdale* v. *Lowe*, 2 Russ. & Myl. 142. Nor even when they are dead, when the purpose for which the publication is sought is to perfect the title to an estate, so as to satisfy the purchaser by means of such evidence of the validity of the vendor's title,—his ability to convey: *Teale* v. *Teale*, 1 Sim. & St. 385. If, in such a suit, the plaintiff neglects to proceed with the examination of the witnesses, the defendant's course is, not to move to dismiss the bill, but to move that unless the proposed examination be completed by a definite period, the defendant should have the costs of the suit: *Beavan* v. *Carpenter*, 11 Sim. 22.

It was at one time doubted whether bills to perpetuate testimony could be brought where the subject-matter concerned dignities, and the better opinion seems to have been that it was not competent, even for an heir apparent to a title, to have instituted proceedings in a Court of equity, with a view to perpetuate testimony in support of his eventual claim: *The Earl of Belfast* v. *Chichester*, 2 J. & W. 439: and see the petition in *The Townshend Peerage case*, 10 Cl. & Fin. 289; but now by the 5 & 6 Vict. c. 69, the privilege of filing bills to perpetuate testimony is extended to all persons claiming any title, honour, dignity, or office upon the happening of any contingency. It is clear, that in order to entitle a party to file a bill to perpetuate testimony, he must show that he has an actual present or prospectively vested interest in the subject to which the evidence applies; therefore the devisee of a lunatic in the lifetime of the lunatic cannot file such a bill with respect to the lands devised (*Sackvill* v. *Ayleworth*, 1 Vern. 105); while a contingent remainderman may—for any interest, however slight, is sufficient: *Lord Dursley* v. *Fitzhardinge Berkeley*, 6 Ves. 252.

PEMMONT *v.* EAST-INDIA COMPANY.

By the conditions of sale of the East-India Company, the buyer is to be allowed six-and-a-half per cent. discount, if the goods are taken away in a certain time; and if not taken away in another certain time, the goods to be resold; and if any deficiency on the second sale, to be made good to the Company. The discount allowed on a second sale is to be a charge on the first buyer.

THE plaintiff bought goods at the sale of the East-India Company. Before the sale the conditions of it were published, viz., that if within such a stated time the goods were taken away and paid for, six-and-a-half per cent. discount should be allowed the buyer, else no discount to be allowed; and if within another limited time did not pay for the goods, and take them away, they should be resold, and warehouse-room to be paid, and to make up the deficiency to the Company, in case should be then sold for less; these conditions not being complied with by the plaintiff, the goods were resold; and the same conditions read, the question was, whether the six-and-a-half per cent. on the second sale should be a charge on him or the Company.

MASTER OF THE ROLLS.—The goods sell so much dearer on account of the discount; the buyer considers the advantage he may have by the discount when he bids for the goods; were there to be no discount, the goods would sell so much the cheaper; therefore it must be a charge on the first buyer, and not on the Company.

The vendor is entitled to recover, in an action on the special contract, whatever damages he can reasonably be supposed to have sustained by the default of a purchaser: *Towers* v. *Barrett*, 1 T.R. 133, 136:

and every incidental loss on the resale, if had recourse to, would, of course, be the measure of the aggregate damage: *Maclean* v. *Dunn*, 4 Bing. 722: and if the money produced by the second sale exceed the original purchase-money, the purchaser who has violated the agreement will not be entitled to the surplus: 1 Sugd. Vend. and Pur. 65, 10th edit. In the recent case in bankruptcy, *Ex parte Moffatt*, 1 M. D. & D. 282, affirmed 2 M. D. & D. 170, a proof was admitted against a bankrupt's estate, not only for the difference between the produce upon a resale of teas, and the sum agreed to be paid, but also for the amount of warehouse rent, interest, and other incidental charges, there being no question as to the right to damages, but only as to the right to proof. See also, *Ex parte Sheppard*, 2 M. D. & D. 431. *In the matter of Gales*, 1 De Gex, 100, 111.

RICHARDS *v.* COCK.

April 30, 1725.

[SAME COMMISSIONERS.]

Legacies given to children, payable at a certain time, and a moiety of a term to one, after the death of his wife; but if should die before portion becomes payable, to go to survivors; this only extends to the pecuniary legacy.

A PERSON possessed of a term for years, and a fortune in money, made his will, and left all of his children pecuniary legacies, payable at different times; and after the decease of his wife, he devised one moiety of the term to his son Bennet, and the other moiety to his son John; and then came this clause: "And if any of my children die before their portion becomes payable, then that to fall equally between my wife and the surviving children." Bennet died in the life of the wife; so question was, whether his moiety of the term should be divided among the wife and surviving children.

It was resolved, that as in common parlance portion is not said of a term, and there being pecuniary legacies on which it may operate, payable shall be applicable to and be

confined to that; this contingency of the wife's dying might
[*13.] *happen when the sons were very old, and long after the money became payable; the sons, by this contingency hanging over them, could not dispose of their interest for the advantage, perhaps the necessities of their families, which would therefore be to their prejudice, which could not be supposed to be done by a father.

The case of *Richards* v. *Cock* serves to illustrate the distinction between a vested and a contingent legacy. The bequest of the term to Bennet was a vested interest, and, as such, transmissible to his representatives; whereas the portion was contingent, payable only in a certain event, and accompanied by a bequest over. Where a testator gives a pecuniary legacy to A. payable on his attaining a certain age, and if he die before such period, then over; this ulterior provision makes it a contingent legacy, dependent on the attainment by the legatee of the prescribed age; but a legacy to A. after the death of B., to whom a previous life estate is given by the same instrument, and without any ulterior limitation, gives him a present vested and disposable interest, because the respective estates of B. and A., between whom the entirety is bequeathed, are both vested at the instant of the death of the testator; and if such ulterior legatee dies before the tenant for life, the remainder will, on the determination of the previous life estate, take effect in favour of the representatives, or legatees, of such postponed legatee: *Jackson* v. *Jackson*, 1 Ves. 217; *Packham* v. *Gregory*, 4 Hare, 396.

It matters not, that the age at which the legacy is to be paid is not attained by the legatee, provided there is no ulterior gift of the legacy in that event: *Love* v. *L'Estrange*, 5 Bro. P. C. 59, Toml. ed.: and even where the legacy is, to a certain extent, conditional and contingent in its terms, yet so strong is the presumption in favour of vesting, that the slightest indicia of intention in the will are laid hold of to support this presumption. Thus the words "if," "when," and "provided," when annexed to the terms of a bequest, would, per se, render such bequest contingent: *Cruse* v. *Barley*, 3 P. Wms. 20; *Hanson* v. *Graham*, 6 Ves. 239: but where the legacy is to A., when, or if he attain twenty-one, the presence of a clause whereby the interest of the legacy in the mean time is directed to be applied for the maintenance and education of the legatee, makes it a vested legacy: *Fonereau* v. *Fone-*

reau, 3 Atk. 645; *Hanson* v. *Graham*, 6 Ves. 239: or even if the intermediate interest is not to be paid until the principal is to be paid, provided there has been an absolute disposition of both, and this will be inferred, because, for the purpose of the interest, there must be a separation of the legacy from the bulk of the testator's estate, immediately on his death: *Booth* v. *Booth*, 4 Ves. 399; *Saunders* v. *Vautier*, Cr. & Ph. 240; *Leeming* v. *Sherratt*, 2 Hare, 14; but the interest must be entirely dedicated, without any discretion in the trustees as to the quantum; and where the gift is through the intervention of trustees, and no period specified for the vesting of the legacy, except in the direction to pay, there the attainment of the particular age is a prerequisite: *Leake* v. *Robinson*, 2 363; and see *In re Bartholemew's Trust*, 1 Mac. & Gor. 354.

Where the legacy is absolutely vested, the mere fact, that the testator has directed payment of it to be postponed to a period beyond the majority of the legatee, will not prevent the legatee insisting on its payment immediately on his attaining twenty-one: *Rocke* v. *Rocke*, 9 Beav. 66.

HILL *v.* HILL.

May 3, 1725.

[MASTER OF THE ROLLS, RAYMOND, COMMISSIONERS.]

No new trial but on Judge's certificate.

IN this case the Court declared, they would not receive account of a trial by affidavits; it has been done on affidavits, but very improperly, for it is only hearing on one side; and for the future will not grant new trial, without certificate of the Judge that he was dissatisfied with the verdict.

Postea, p. 20, same point.

It must be clearly understood that the application, in the case of *Hill* v. *Hill*, was for a new trial of an issue directed by the Court of Chancery, for if it had been an action at law the motion for a new trial must have been made before the Court in which the action was brought: *Fowkes* v. *Chadd*, 2 Dick. 576; *Ex parte Kensington*, Coop. 96; *Hope* v. *Hope*, 10 Beav. 581. When either the plaintiff or defendant is dissatisfied with the result of an issue the course is to apply ex parte to the Court which directed the issue: *Reece* v. *Reece*,

1 Myl. & Cr. 372, and the 47th Order of 1828: at the same time showing a reasonable ground for questioning the verdict, and for sending to the Judge who tried the issue for his notes: *Morris* v. *Davies*, 3 Russ. 318. It is not a motion of course; Memorandum, 6 Madd. 58; for the Judge will not be called on to furnish his notes unless it is clearly shown that the notes are necessary for the purpose of the motion: *Hungerford* v. *Jagoe*, 1 Jo. & Lat. 691: nor are the notes of the Judge, when obtained, evidence of the facts intended to be relied on; they must be brought before the Court by affidavits: *Ex parte Learmouth, in re Walker*, 6 Madd. 113. The affidavit, however, was dispensed with where the Court was satisfied with the statement of the counsel moving who had attended the trial: Memorandum, 6 Madd. 58. In the event of a new trial being granted neither party ought to be allowed to give the previous verdict in evidence: *O'Connor* v. *Malone*, 6 Cl. & Fin. 572, which impugns the authority of *Baker* v. *Hart*, 3 Atk. 542.

DALTON *v.* DALTON.

Sherman v. *Earl of Bath.*

IN this case it was said, that it has been taken, since the case of *Sherman* v. *Earl of Bath*, that after three trials had, a perpetual injunction has been allowed.

Bills of peace are among the number of those which exclusively claim the intervention of Courts of equity. The jurisdiction is of very ancient date: see Gilb. For. Rom. 195. They are based on the maxim of the law, "Expedit reipublicæ ut sit finis litium," 2 Inst. 411; and though in their origin the remedial process of equity was called forth and maintained where one individual had to establish or defend a right against a great number of persons, as in the case of *Mayor of York* v. *Pilkington*, 1 Atk. 282, yet, by a liberal extension of the principle, Courts of equity have quieted one man's possession against the harassing and vexatious litigation of a single individual after a satisfactory adjudication of the question; the right however must be satisfactorily adjudicated at law before the injunction will be granted: *Lord Tenham* v. *Herbert*, 2 Atk. 483; see also *The Attorney-General* v. *The Corporation of London*, 8 Beav. 270. In the case of *Sherman* v. *Earl of Bath*, Pre. Ch. 261, reversed 4 Bro. P. C. 373, Toml.

edit., an injunction was granted to restrain further litigation between the same parties and all others claiming under them upon the same title after five several verdicts had been obtained in the plaintiff's favour: see also *Devonsher* v. *Newenham*, 2 Sch. & Lef. 199, and see p. 211. Where there had been a possession by the plaintiff for sixty years, the previous establishment of his title at law was dispensed with: *Bush* v. *Western*, Pre. Ch. 530: nor is it necessary that there should be any definite number of trials before the Court interposes: *Leighton* v. *Leighton*, 1 P. Wms. 671; *Thomas* v. *Jones*, 1 Y. & C. C. C. 510.

Where the plaintiff's remedies at law are involved in difficulty and circuity of action, and the legal right which is sought to be protected is doubtful and capable of being ascertained by an issue, the Court will direct one rather than prejudice the legal question by granting the injunction: *Cory* v. *The Yarmouth & Norwich Railway Company*, 3 Hare, 593; *Ridgway* v. *Roberts*, 4 Hare, 106.

There is another class of bills, somewhat analogous to those under consideration, which are of more frequent occurrence in Ireland than in England, which are termed possessory bills, and which can only be filed supported by affidavit that the plaintiff has been in the actual quiet and peaceable possession of the premises in question for three years before the filing of the bill, saving the disturbances given by the defendant: *Anon.* 2 Ves. 415; *Hemphill* v. *M'Kenna*, 3 Dr. & War. 183.

WHITACKRE *v.* WHITACKRE.

Trustees, or persons acting under them, cannot be purchasers.

STOCK was invested in trustees by will; the trustees ordered their agent, who was the testator's brother, to sell the stock, so that he did not sell for less than 2500*l.*, and whatever he sold for more should be for his own trouble. The agent agrees for the sale of this stock for 3400*l.*, and after becomes a purchaser of the stock from the trustees for the sum of 2800*l.*, who allow him 100*l.* for his trouble in buying; so that he got 600*l.* by the stock, besides what was allowed for his trouble.

Bill was brought for the overplus; which was decreed, the Court declaring, that no trustee, or any person acting under a trustee, can ever be a purchaser in this Court, on account of the great inlet to fraud.

The doctrine which is established in this case—viz., that a trustee cannot purchase for himself; in other words, that he who undertakes to act for another in any matter shall not in the same matter act for himself—has been most rigidly adhered to in every case where there has existed anything like a fiduciary relation between buyer and seller. Lord *Thurlow*, in the case of *Forbes* v. *Ross*, 2 Cox, 113, observed, that "there is no one more sacred rule of a Court of equity, than that a trustee cannot so execute a trust as to have the least benefit from it himself;" adding, "that wherever a trustee contracts with himself, he cannot spare himself." In that case executors were empowered to lay out trust moneys on land or on personal securities, at such rate of interest as the trustees should judge reasonable. They exercised this authority by a loan at 4*l.* per cent. to one of themselves; and, although there was ample security from the circumstances of the borrowing executor, and, although it was conceived by the executors, that in lending the money to one of themselves, they were going as near as possible to the testator's intention; and, although there was the entire absence of anything like fraud, constructive or otherwise, yet because 5*l.* per cent. might have been made of the money, it was decreed that the borrowing executor should be charged with interest at that rate: S. P. *Westover* v. *Chapman*, 1 Col. 177. In accordance with this rule, Lord *King* declared in the case of *Whitackre* v. *Whitackre*, that "no trustee, or any person acting for a trustee, can ever be a purchaser in this Court on account of the great inlet to fraud." The only case in which the proposition, as asserted by Lord *King* in *Whitackre* v. *Whitackre*, has been at all impugned, is the case of *Whichcote* v. *Lawrence*, 3 Ves. 750: but even there, Lord *Loughborough* decided in conformity with the rule, although he observed, that the rule, "that the trustee cannot buy of the cestui que trust," was not very "correctly laid down in most of the cases, and that the transaction to be impeached must be shown to be one in which the trustee has profited." But this dictum has never been corroborated by any judicial decision, while the current of authority has been all the other way. In the case of *Ex parte Lacy*, 6 Ves. 627, Lord *Eldon* expressly disavowed the interpretation put on

the rule by Lord *Loughborough*, and laid it down, that "whether the trustee makes advantage or not, if the connexion does not satisfactorily appear to have been dissolved, it is in the choice of the cestuis que trust whether they will take back the property or not, if the trustee has made no advantage;" the rule, he observes, "is founded on this, that though you may see in a particular case that he has not made advantage, it is utterly impossible to examine upon satisfactory evidence, in ninety-nine cases out of a hundred, whether he has made advantage or not." The same principle was acted upon in the case of *Ex parte James*, 8 Ves. 337. The case of *Coles* v. *Trecothick*, 9 Ves. 234, was one of very peculiar circumstances; the whole execution of the trust devolved upon the cestui que trust, and he took upon himself the entire management of the sale; and, of course, could not be heard to repudiate the transaction. But, in again affirming the rule, Lord *Eldon*, in *Ex parte Bennett*, 10 Ves. 394, said, that "the reason why every such transaction is impeachable is, that it would not be safe, with reference to the general administration of justice in affairs of trust, that a trustee should be permitted to purchase, for human infirmity will in very few instances permit a man to exert against himself that providence which a vendor ought to exert in order to sell at the best advantage, and which a purchaser is at liberty to exert for himself, in order to purchase at the lowest price." Lord *Erskine*, in the case of *Morse* v. *Royal*, 12 Ves. 355, upholding a transaction between the trustee and his cestui que trust, inclined to coincide in the views of Lord *Loughborough*; but in that case there were peculiar circumstances of confirmation and acquiescence on the part of the cestui que trust. Lord *Eldon*, however, in the subsequent case of *Downes* v. *Grazebrook*, 3 Mer. 200, again expressly affirmed the doctrine laid down in *Whitackre* v. *Whitackre*. The rule was again recognised by Lord *Langdale*, in the case of *Greenlaw* v. *King*, 3 Beav. 49; where, at the suit of a succeeding rector in setting aside a transaction between the bishop and the preceding rector, he observed, that the question "was not whether there was a contrivance to get an undue advantage or not, but the question was, whether this Court will permit a person standing in a fiduciary and confidential situation, in which the bishop then was, to make himself an interested party in the very transaction which he was bound, as trustee, most vigilantly to superintend."

The dealing has been interdicted by what has been termed a technical morality, but it is not the less stringent on that account, and the only sense in which a trustee for sale can be the purchaser is, "that he may contract with his cestui que trust that with reference to the contract of purchase they shall no

longer stand in the relative situation of trustee and cestui que trust, and the trustee having through the medium of that sort of bargain evidently, distinctly, and honestly proved that he had removed himself from the character of trustee his purchase may be sustained." *Sanderson* v. *Walker*, 13 Ves. 601. In the recent case of *Geldard* v. *Randall*, coram *Bruce*, V.C. 9 Jur. 1085, his Honour refused to allow an executor to bid for some property which belonged to his testator's estate, which was directed to be sold by order of the Court, as it would be quite without precedent. Lord *Brougham*, in the case of *Hamilton* v. *Wright*, 9 Cl. & Fin. 124, in setting aside a purchase by a Trustee, says, "the conduct of the trustee not being blameable in the purchase is nothing to the purpose, for the Court must act upon the general principle, and unless the policy of the law makes it impossible for the trustees to do anything for their own benefit, it will be impossible for the Court to see in what cases the transaction is morally right and in what cases it is not." See also *Carter* v. *Palmer*, 8 Cl. & Fin. 657; *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714; see also *Taylor* v. *Salmon*, 4 Myl. & Cr. 134; *Nelthorpe* v. *Holgate*, 1 Coll. 203; *Barker* v. *Harrison*, 2 Coll. 546; *Thomas* v. *Phillips*, 11 Jur. 80, coram *Bruce*, V. C. *In re Bloye's Trust*, Mac. & Gor. 488.

COLCHESTER *v.* COLCHESTER.

On a rehearing nothing is opened but what is petitioned against.

ON a new bill to carry a decree into execution, Court may vary and alter what is thought proper; but on a rehearing no further than the petition extends; but if the *petition be against the decree in general, though particular reasons are given, the whole is open; but otherwise it is if the petition be only against one or two particulars.

[*14.]

Postea, p. 24.

It is laid down by Lord *Hardwicke*, in the case of *Rawlins* v. *Powel*, 1 P. Wms. 300, and it has been the rule since, that "where the plaintiff petitions to rehear, the cause is open as to the whole and every part of it with respect to the defendant; while in relation to

the plaintiff it is only open as to those parts of it complained of in the petition;" and if the respondent can satisfy the Court that the appellant is not even entitled to the decree which he has obtained, part of which only is impugned by the appeal, it is competent to the Court to grant the respondent a more extended relief than that awarded him in the Court below: *Sullivan* v. *Jacob*, 1 Moll. 472; *Oldham* v. *Stonehouse*, 3 Myl. & Cr. 317. A petition of rehearing is virtually an appeal from the decree, either of the Master of the Rolls or one of the Vice-Chancellors, to the Lord Chancellor; although it may doubtless be reheard by the same judge. "The appeal," observed Lord *Macclesfield*, "was only to give him an opportunity of hearing what could be offered why he should not enrol it as his decree, and therefore the cause was entirely open, and the party at liberty to offer what he could against his signing and enrolling the decree;" *Wright* v. *Pilling*, Prec. in Ch. 496; but matter not in issue in the Court below cannot be put in issue on a rehearing; *Wood* v. *Griffith*, 19 Ves. 550; aliter as to an appeal motion; *Const* v. *Barr*, 2 Russ. 163; or an appeal petition which is like the renewal of a motion; *Richards* v. *Platel*, Cr. & Ph. 84.

A creditor, though not actually a party at the date of the decree, may file a petition for rehearing: *Giffard* v. *Hort*, 1 Sch. & Lef. 409; but as his privilege is derived from being in the same interest as the plaintiff, so he is precluded from setting up any ground of appeal not open to the party in whose shoes he stands *Gwynne* v. *Edwards*, 9 Beav. 22; for he is a quasi party, and must abide by the conduct of the party who managed the cause: *Hercy* v. *Dinwoody*, 4 Bro. C. C. 269. The Court will not entertain petitions of rehearing after a considerable lapse of time, and where the interests adjudicated upon have undergone various devolutions: *Davenport* v. *Stafford*, 8 Beav. 503. On an appeal, strictly so called, *i. e.* where the decree has been enrolled, no evidence (except where the question of rejection of evidence is the subject of the appeal, *Maccabe* v. *Hussey*, 5 Bli. N. S. 715), can be read which was not read in the Court below: *Eden* v. *Earl of Bute*, 1 Bro. P. C. 465, Toml. ed.; but this rule is not without exception, as in the case of *Noel* v. *Noel*, 12 Price, 214, where a will was the subject of a suit making an express reference to a settlement which was omitted to be adduced in the Court below, though the production of it altered the whole case, the Court permitted it to be read; see also the observations of Lord *Lyndhurst* and Lord *Brougham*, in *Attwood* v. *Small*, 6 Cl. & Fin. 301, 304. The appellant cannot have a general account in the Court above, though his bill prays one, if he has

only insisted on a particular account in the Court below: *Flint* v. *Walker*, 5 Moore, P. C. C. 179. A decree being interlocutory until enrolment, evidence is permitted to be read on a rehearing which was not read at the original hearing: *Buckmaster* v. *Harrop*, 13 Ves. 456; *Williams* v. *Goodchild*, 2 Russ. 91. It is competent however for a plaintiff, on a rehearing, to withdraw from the evidence any portion of the answer which may have been read on the original hearing: *Allfrey* v. *Allfrey*, 1 Mac. & Gor. 87.

In order to prevent a party from vexatiously appealing, it is required, by the 42nd order of April 1828, that a deposit of £20 be previously made, to be paid to the adverse party if the decree or order appealed from is not materially varied; and in order to diminish the expense of appeals and rehearings, it is, by the 50th Order of August, 1841, declared, that it shall not be necessary to state the proceedings anterior to the decree or order appealed from or sought to be reheard. A second rehearing is never permitted, except where leave is first obtained; *Mousley* v. *Carr*, 3 Myl. & K. 205; and this applies equally, whether the decree in question has been reversed or affirmed on the first rehearing: *Moss* v. *Baldock*, 1 Phill. 118. The rule was also recognised in the case of *Prendergast* v. *Lushington*, coram L. C., Dec. 14, 1846; where the order upon the first rehearing not having actually been drawn up, the preliminary objection, that leave had not first been obtained, did not avail, the Lord Chancellor allowing the cause to be set down, to be spoken to on the minutes, and terming it a reconsideration and not a second rehearing.

LEWEN *v.* LEWEN.

May 4, 1725.

[MASTER OF THE ROLLS, GILBERT, COMMISSIONERS.]

Whether settlement of a chattel in bar of dower bars custom of London, unless said to be in bar of it.

A FREEMAN of London, before marriage, made a settlement on his wife of lands for her jointure, and thirds at common law; and after marriage he settled a copyhold and

leasehold estate on her, for a better provision and increase of jointure, in bar of dower.

Question was, whether it will bar her of her customary estate as widow to a citizen of London, not being expressly mentioned to be so; and that it would not, the case of *Atkins* v. *Watterson* was cited, as so resolved.

Afterwards, 31 May, this cause was spoke to again; and Baron *Gilbert* said, that the settlement of lands will be no bar of dower by the custom. But as a personal estate was settled in bar of dower, it was a doubt with the Court whether it would not amount to a composition. So city to certify their custom, whether a settlement of chattels, said to be in bar of dower, will bar the customary right, unless expressly said to be so.

The certificate returned by the City of London was, that if a woman, before her marriage with a freeman of London, accepts of a settlement upon her, to take effect after her husband's death, in case she survives him, of part of his personal estate without taking notice of the custom of London, she is thereby barred of her customary part of his personal estate: see *S. C.* sub nomine *Lewin* v. *Lewin*, 3 P. Wms. 16. The presumption against the wife is from the nature of the property settled, which, being personalty, negatives her claim to part of the same property by settlement, and to another part of that property by the custom; but a jointure of lands, unless expressed to be in bar of the widow's right to the customary estate of her husband, will not deprive her of such rights under the custom; *Babington* v. *Greenwood*, 1 P. Wms. 530; in short, nothing less than an express stipulation in, or a necessary implication from, the terms of the settlement will be construed to exclude any rights of the widow: *Ib.* 533. By the 17th sect. of 11 Geo. I. c. 18, freemen may by will dispose of their personal estate; but, by the 18th sect., if such right is not exerted, the personalty remains subject to the custom: see *Clerke* v. *Jackson*, post, 52. The custom, however, is only operative in cases of total intestacy: *Cowper* v. *Scott*, 3 P. Wms. 124; *Wilkinson* v. *Athinson*, Turn. & R. 255; *Fitzgerald* v. *Field*, 1 Russ. 416.

ASHTON *v.* DAWSON AND VINCENT.

May 5, 1725.

Donatio mortis causâ.

ONE Cowper, after making his will, three or four days before his death, gave Mrs. Dawson some bank-notes to her own use, if he died, else to be returned; on his death, Ashton, who was his executor, on inquiring into the affair, said he was very well pleased that they were given her: she desired Mr. Ashton to keep the notes for her, and employ them to the best advantage for her; he took them, and gave her a note for them; she having after married contrary to his inclination, he refused to deliver up the notes; on which action was brought on his note, and a recovery and damages. Bill was brought here to be relieved, but relief denied.

CURIA.—You come here to be relieved against the note, which cannot be, but on the foot of fraud: at the time of giving it the whole affair was examined; it is not a legacy, nor is there any occasion for the executor's assent to it; it
[*15.] is not a gift at common law, but in view of death; *here are express words; but if he had used no words, and had been near death, it had been looked on as a donation mortis causâ; it is a testamentary legacy, of which the common law takes notice, but not provable in the Ecclesiastical Court, it is only questionable here; and the executor's assent is not necessary, because might die intestate. This further differs from a legacy, which depends solely on the disposing words; but in a donatio mortis causâ must be a delivery, which is something more. So bill dismissed with costs.

This cause was reheard before Lord Chancellor *King*, August 6, 1725, and affirmed the decree, only altered it in respect of the defendants' costs; who being trustees should have it out of the estate; but inclined to have ordered a trial at law, had Mr. Ashton not given a note.

To constitute a valid disposition as donatio mortis causâ, there are three necessary ingredients: 1st, That the donor shall make it "propter mortis suspicionem," in contemplation of death from an existing disease. 2ndly, And as corollary from the first requisite, that inasmuch as the gift is made in contemplation of death from an existing disease; *Tate* v. *Hilbert*, 2 Ves. jun. 121; so "si supervixisset is qui donavit," the power of resumption on that contingency is necessarily an inherent incident to such gift; and, 3rdly, There must be a delivery, actual or symbolical, of the gift: *Ward* v. *Turner*, 2 Ves. 431. Where a person had deposited two cheques in a box and delivered the box to another person, and at the time of the delivery had told the donee to go after his (the donor's) death to his son for the key; but in the mean time, and until his death, he required the box to be handed over to him every three months while he lived, it was clear that the disposition in every way failed to constitute a donatio mortis causâ: *Reddel* v. *Dobree*, 10 Sim. 244. So, where an obligee of a bond, only five days before her death, assigned it by an instrument not under seal, and the assignee failed to establish the assignment, but set it up as a valid donatio mortis causâ, it was held that the irrevocable nature of the transaction precluded its being considered as a donatio mortis causâ: *Edwards* v. *Jones*, 1 Myl. & Cr. 226. The mere inscription on a packet of the name of the intended donee, though it was in pursuance of a previous request to deliver the packet, is not such a delivery as will inure to the benefit of the nominee: *Bunn* v. *Marsham*, 7 Taunt. 231. The delivery need not be to the donee; it may be to a trustee; *Drury* v. *Smith*, 1 P. Wms. 404; but the trustee must be the agent for the legatee and not for the donor: *Farquharson* v. *Cave*, 2 Col. 367. If the donor retains in his own custody the subject-matter of the gift, he cannot be considered the trustee; *Hawkins* v. *Blewitt*, 2 Esp. 663; though, if the disposition be by deed, the retention both of the instrument as well as the subject-matter of the gift in the donor's possession will not make it the less valid, albeit no donatio mortis causâ: *Fletcher* v. *Fletcher*, 4 Hare, 67; see also *Hope* v. *Harman*, 11 Jur. 1097. It was doubted at one time whether a mortgage deed was capable of being assigned as a donatio mortis causâ; but it has been decided, in the case of *Duffield* v. *Elwes*, 1 Bli. N. S. 497, that by the delivery of the deeds the rights secured thereby accrued to the donee. A cheque or promissory note of which the donor is the drawer, or bills or notes not payable to bearer, are incapable, because choses in action, of being the subject of a donatio mortis causâ: *Miller* v. *Miller*, 3 P. Wms. 356. The assent of the executor is not necessary to the

perfection of a gift donatio mortis causâ; *Tate* v. *Hilbert*, 2 Ves. jun. 120; but by the 7th sect. of 36 Geo. 3, c. 52, it is liable to legacy duty. Whenever there is a doubt as to whether the disposition is or not actually a donatio mortis causâ, an issue will be directed to try the fact: *Duffield* v. *Elwes*, 1 Bli. N.S. 531.

FELTHAM *v.* FELTHAM.

May 7, 1725.

Portions were charged on lands, and if any of the children die before twenty-two, or marriage, to go to survivors; one dies, that portion shall not be paid before it would have become due had the child lived.

A PERSON charged his lands with the payment of certain portions to his children; and appointed, that if any of his children should die before the age of twenty-two, or marriage, such child's portion should be divided equally among the survivors; one of the children died before the age of twenty-two unmarried; the question was, whether the survivors should receive their proportion of it when they received their own portions, or not till this portion of the deceased would have become due. The Court was of opinion, it should be paid when the deceased would have received it; because else would be so many several divisions of it as each person's title to it accrued, whereas it was designed to be one entire payment. If a legatee dies, his executors or administrators shall not receive the legacy before the deceased himself might have done it; for it is absurd, that an accident of death of a legatee should vary a time of payment appointed by another person; and this is particularly strong, being to charge a real estate. The devisor might perhaps have made a computation, and considered how, and at what time, his estate would bear such a charge; and if the part of the deceased should be paid at the time that the survivor's portion was payable, it might be charging the estate sooner than the devisor intended it should.

The case of *Feltham* v. *Feltham* has established a distinction, which has ever since been recognised, with respect to the payment of legacies in remainder, chargeable on, but payable at a future period out of, land; and legacies in remainder, payable at a future period out of personalty. To illustrate this difference, it must be remembered, that in the case of a simple bequest to A., payable at his age of twenty-one, the representatives of A., in the event of his death before the prescribed period, cannot claim payment of the legacy until the time when A., if he had lived, could have claimed it; *Anon.* 2 Vern. 199; *Chester* v. *Painter*, 2 P. Wms. 336; unless the legacy was to carry interest: *Collins* v. *Metcalfe*, 1 Vern. 462; *Vize* v. *Stoney*, 1 Dr. & War. 337. Had the bequest been given over to B., in the event of A.'s death before a certain time, it is an equally clear rule of construction that B. is entitled to payment on A.'s death, and irrespective of the period which had reference to A. and his representatives only: *Laundy* v. *Williams*, 2 P. Wms. 478. But, as decided in *Feltham* v. *Feltham*, the above distinction is inapplicable to legacies in remainder, when charged on the inheritance; for, the heir being always regarded with favour in equity, the ulterior legatee, in the event of the death of the previous taker, before the period when the charge was to be raised, is not permitted to claim the amount of the legacy until the period when the original legatee could, if living, have required its payment; and as the heir is to suffer by the raising of these portions, it may reasonably be presumed, in his favour, that the testator might compute within what time the respective legacies might be paid, so that this additional portion should not be paid before such time as the daughter to whom it was given should have come to the age of twenty-one years, if she had lived: 5 Bac. Abr. 181.

Another illustration of the favour with which the heir is regarded in Courts of equity is, that where a will contains no express limitation over, upon the death of the first legatee, equity will upon such event absolutely relieve the inheritance of the burden: *The Lord Pawlet's case*, 2 Vent. 366; *King* v. *Withers*, Ca. temp. Talb. 117. Where, however, the intention to charge the lands is manifest, as where the legacy was to certain legatees or their lawful representatives, within twelve months after the youngest attained twenty-one, it was held a vested interest in each: *Brown* v. *Wooler*, 2 Y. & C. C. C. 134.

CHILD *v.* PITT.

[* 16.] * *De Term. Sanct. Trin., May* 31, 1725.

[COMMISSIONERS, GILBERT, RAYMOND.]

Bill brought by a goldsmith for commission for the custody of jewels; the Court left him to a quantum meruit. (Qy. of that.)

SIR STEPHEN EVANS had Governor Pitt's large diamond (which was after sold to the King of France), put out to polish, and inspected the work, as was suggested; the diamond was taken out of his hands and sold.

He now brings bill for commission.

It was insisted, that commission is never for the custody of diamonds; and that the Bank may as well ask commission for the custody of money, and commission never arises but on sale. What is called inspecting the polishing, was obliging his friend with so extraordinary a sight.

The Court declared, they could not take upon themselves to say, that the credit which arose to the shop by the custody of the jewel, was equal to the trouble in inspecting the work; may bring a quantum meruit, where that will be determined.

Assignees stand in the place of the bankrupt; and where he would be obliged to pay costs, so shall they out of the estate.

Sir Stephen Evans had also diamonds consigned to him by Governor Pitt to sell for his use; he charged them fraudulently at a less value than he sold them for, and after became a bankrupt; upon which a question arose, whether the assignees under the commission of bankruptcy should pay costs: And resolved they should, *out of the estate;* for if he had been here himself he must have paid costs, and the assignees stand in his place, as to his estate.

But it appearing that the paper, in which he charged them at a less value than what he sold them for, was not delivered to Mr. Pitt, it was looked upon, not as actual * fraud, but only a preparation to it, of which he might have repented, so no costs against the assignees. [*17.]

It is an inflexible rule, that a plaintiff cannot institute proceedings in a Court of equity when for the same matter he can have as effectual and complete a remedy in a Court of law; *Cud* v. *Rutter*, 1 P. Wms. 570; but that remedy must be clear and certain: Mit. Pl. 123, 4th ed. Wherever damages may be awarded, and would be an equivalent for the injury complained of, as for not transferring stock, a Court of equity will not enforce the specific performance of an agreement for the transfer: *Doloret* v. *Rothschild*, 1 Sim. & St. 590. It does not however follow, that where a party has it in his power to proceed at law for compensation in damages, he is thereby precluded from proceeding in equity, if the redress he seeks can be more effectually and completely obtained in the latter, as in the common case of bills for specific performance of a contract for sale of lands or certain specific chattels; there equity will compel the specific performance of the contract by ordering the conveyance of the particular land; *Halsey* v. *Grant*, 13 Ves. 73; or the delivery of the specific chattel; *Duke of Somerset* v. *Cookson*, 3 P. Wms. 390; *Nutbrown* v. *Thornton*, 10 Ves. 159. It has been held, that shares in a particular railway are not within the principle applicable to stock, for they "are limited in number, and not always to be had in the market:" *Duncuft* v. *Albrecht*, 12 Sim. 199. There must however be an allegation that the party, from whom the transfer is sought, has in his possession the particular shares, otherwise (the intendment being against the pleader) it will be presumed that the defendant has not the shares, and therefore that the plaintiff is calling on the Court to compel the defendant to do a certain thing which the inference is he cannot do, *Columbine* v. *Chichester*, 2 Phill. 29.

It was doubted at one time whether it was competent for a man to file a bill for the delivery of deeds, as detinue would lie; but, upon the principle already adverted to, the specific documents would be ordered to be delivered up; *Brown* v. *Brown*, 1 Dick. 62; so, where an estate was held by a horn, a bill was permitted to be brought to have the thing itself delivered up; *Pusey* v. *Pusey*, 1 Vern. 273; so, in the case of a bill filed to compel the delivery of an altarpiece, or other curiosity in specie, as occurred in *Duke of So-*

merset v. *Cookson*, 3 P. Wms. 390; and the intrinsic value of the article forms no consideration in the question whether a bill may be sustained for its recovery: see *Wood* v. *Rowcliffe*, 3 Hare, 304: the ground of the jurisdiction being that a compensation in damages may not be definitely ascertainable; as, where there was a contract for the sale of 800 tons of iron, to be paid for in a certain number of years by instalments, for the profits on the contract being contingent could not be precisely estimated by a jury, and the calculation of damages would be based on conjecture; *Adderley* v. *Dixon*, 1 S. & S. 607; or, if ascertainable, that they will not afford the redress which a party wanting a specific chattel has a right to require: see 3 Hare, 304.

Second resolution. — With respect to assignees in bankruptcy, it may be laid down as a general rule that they can only avail themselves of, and are subject to, the same equities as the bankrupt could assert or be bound by. Wherever at first sight they may appear to stand in a more favourable position, it is when they occupy one which the bankrupt could never occupy; *e. g.*, as in repudiating the burdens of a lease which may turn out to be in the nature of a "damnosa hæreditas." If the assignee had not this privilege, the general body of creditors might be injured for the benefit of a single creditor (the landlord), and therefore under such circumstances the assignee in bankruptcy may either exercise the option of assigning to a pauper, *Onslowe* v. *Corrie*, 2 Madd. 330; *Taylor* v. *Shaw*, 1 B. & P. 21, or may passively wait the landlord's petition under the 75th sect. of 6 Geo. IV. c. 16, for an order upon him to elect: *Slack* v. *Sharpe*, 8 Ad. & E. 366; *Ex parte Hopton*, 2 M. D. & D. 347.

In the case of *Child* v. *Pitt*, assignees were affected only so far as they had assets of the bankrupt in their hands; but the later authorities have extended this liability ultra their receipts; as, for instance, where a bill is brought to foreclose a mortgage, the equity of redemption in which has in consequence of the mortgagor's bankruptcy vested in his assignee, the latter will, if there be no surplus, be personally liable for the costs even of his disclaimer; for he accepts the office of assignee with all its incidents, qui sentit commodum sentire debet et onus; *Appleby* v. *Duke*, 1 Hare, 303; *S. C.* 1 Phill. 272; *Clarke* v. *Wilmot*, ib. 276; *Hughes* v. *Kelly*, 3 Dr. & War. 495; *Grigg* v. *Sturgis*, 5 Hare, 93; impugning the doctrine of the earlier cases of *Peake* v. *Gibbon*, 2 Russ. & Myl. 354; *Woodward* v. *Haddon*, 4 Sim. 606. In order to obtain an immunity from costs by reason of his disclaimer, a defendant must show that he had no interest in the property at the time the bill was filed: per *Wigram*, V. C., *Gabriel* v. *Sturgis*, 5 Hare, 101; Mit. Pl. 319, 4th ed.

BARKER *v.* GILES AND SMITH.

May 31.

Devise to A. and B., the survivor and survivors of them, their heirs and assigns, to be equally divided between them share and share alike, is a joint-tenancy for life, with different inheritances.

A MAN devised his estate to trustees, to be sold for payment of debts and legacies, and the residue in trust, "to the use of Jeremy and Robert Barker, (who were his nephews,) the survivor and survivors of them, their heirs and assigns, to be equally divided between them share and share alike." Jeremy died in the life of the devisor; so the question was, whether it was a joint-tenancy, or tenancy in common; for if a tenancy in common, would pro tanto be lapsed, as dying in the life of the devisor, and go to the heir at law.

After argument, Baron *Gilbert* was of opinion it was a joint-tenancy.

Justice *Raymond*, that it was a tenancy in common.

The Court being thus divided in opinion, it was ordered to be spoke to again, ut res nova; which was done, June 4, before Lord Chancellor *King*.

When it was insisted on, on the part of the plaintiff, that the words, "equally to be divided between them," do not in their legal operation amount to a tenancy in common; this is uncontroverted, that in a deed it would be so; and in Dyer, 25, it is doubted, whether even in a will, where the most liberal construction is, whether "equally to be divided between them," will be a tenancy in common; but in *Ratcliff's case*, 3 Coke, 37 A, it has been resolved a tenancy in common on account of the intent, but solely on the intent, as it would not be so in a conveyance; so not ex vi termini, but in the intent, which intent is explained

here by his own words; so that to make it a tenancy in common, must be from his intent, and that intent appearing otherwise by his own words, to make it so, would be to make it so contrary to his intent.

Fisher v. *Wigg*. A copyhold was surrendered, "to the use of five, equally to be divided among them and their respective heirs and assigns;" the Court was divided, joint-tenancy or tenancy in common; but Lord Chief Justice *Holt* was of opinion it was a joint-tenancy.

To some purposes a joint-tenant may be said to divide, as by assigning his part; and only one can forfeit his part; so that the subsequent words do not directly destroy the word "survivor."

[* 18.] * It must have been the intent of the devisor, that in case one died in his life, then to the survivor; else not, but to be equally divided; the words import this.

The heirs at law are very remote relations; the primary original design of the devisor was, that the heirs at law should have no part of his estate; and by the creation of trustees the descent was broke; so that if they claim it, it is as a resulting trust.

3 Lev. 373. The case of *Blisset* and *Cranwell*, in 3 Lev. 373, cannot be supported by the reasons there; one is, that the last words control the former; in different sentences that may hold, but cannot in the same individual sentence; to suppose he has one intent at the beginning, and another at the latter end of a sentence, would be very odd.

It is said, the word "survivor," if not expressed, would be understood, and therefore it signifies nothing; which is the greatest fallacy in nature; if it had not been expressed it would have been implied; and shall the expressing of what would have been implied unexpressed, make it, when expressed, signify nothing?

Salk. 226. The report in Salk. of *Blisset* and *Cranwell*, 226, is different from Levinz.

Style 211. Style, 211. *Tuckerman* v. *Jefferies*, 6 Ann', to his two daughters, to be equally divided, after their deaths, to the right heirs of one; these words, "equally to be divided," were not strong enough to make a tenancy in common; but was determined to

be a joint-tenancy, though there wanted the word "survivor."

To which it was answered, that the words "equally to be divided," in a will, had for these one hundred and fifty years created a tenancy in common. 2 Ch. Ca. 64. Salk. 226.

The case of *Tuckerman* v. *Davis* is answered, by observing that it was not given over till after the death of them two.

Joint-tenancy is in the nature of things extremely irrational, and therefore Courts of equity bear hard against it; and even common-law Courts construe it tenancy in common, wherever possibly can; it is extremely absurd, that one shall take all in disinherison of the heir, because he happens to have a better constitution.

But let the words be ever so plain to shew his intent to disinherit the heir at law, if he does not do it consistent with the rules of law, it signifies nothing: here one of the persons dying in his life-time, though, if he had out-lived him, the heir would have been totally disinherited; as it is, it is so much undisposed of; and therefore the laws make *the provision to be to him who had a natural right, his heir at law. [*19.]

These cases were cited (Cro. El. 729; Moor, 667; Owen, 127; 2 Ventr. 365; Style, 434) *Bale* v. *Coleman*, before Lord Chancellors *Cowper* and *Harcourt*.

KING, CHANCELLOR.—In this Court this is to be considered as a real estate; constructions of wills are the same in a Court of equity as at law; the question is, what is the intent? If the intent is contrary to the rules of law, the legal construction must prevail: where the words can possibly have any construction put on them, all must be preserved; but where are nugatory, as "survivors," and can have no manner of construction, must be rejected.

If both the nephews had survived, they had been tenants in common; and whatever would have been the construction if they had survived, must be so now, as the construction is to be on the words of the will; which cannot be varied by subsequent accidents.

If it had been to two and their heirs, and one had died,

it would have been an immediate devise, and not by way of joint-tenancy.

The devisor designed as well that the nephews should both take, as the heir at law should be disinherited; and the intent must be as at the time of making of the will, unless contravened by accident, or act of God. Here by act of God one dies, so there is a determination of his intent, as to one.

This is a joint-tenancy for life, with different inheritances; and thus considered, it is a plain, easy, natural construction of the words, by which they will be all preserved; and by any other some must be rejected.

So decreed the whole to the plaintiff for life; and after his decease, one moiety to his heirs, and the other moiety to the defendant, and his heirs.

The interpretation of wills must be according to the maxim "verba intentioni debent servire;" effect must be given to every word, if practicable. In the case of *Barker* v. *Giles* there is an apparent contrariety of intention; for words importing a tenancy in common are superadded to what otherwise would have clearly indicated a gift in joint-tenancy; but regard being had to the intent, the discrepancy is best reconciled by the construction of Lord *King*. Had the ulterior limitation been to the devisees in tail, instead of in fee simple, they would, according to *Littleton*, by necessity of reason, clearly have had several inheritances, because they were not capable of having common heirs of their bodies: Litt. section 283; see also *Folkes* v. *Western*, 9 Ves. 456; and *Doe dem. Littlewood* v. *Green*, 1 M. & W. 229; in the latter case, a devise of real estate to two nieces equally between them, to take as joint-tenants, and their several and respective heirs and assigns for ever, it was held they took as joint-tenants for life with remainder expectant on the decease of survivor as tenants in common. It is to be observed, that words in a will which clearly indicate that the devisees should take in joint-tenancy will not be so construed where the devise is to husband and wife, for they are regarded as one in law, and take by entireties: *Bricker* v. *Whatley*, 1 Vern. 233; *Doe dem. Freestone* v. *Parratt*, 5 T. R. 652. As a corollary from this rule, *Littleton* states, that "if a joint estate

be made of land to a husband and wife, and to a third person; in this case the husband and wife have in law in their right but the moiety, and the third person shall have as much as the husband and wife, viz., the other moiety, &c. And the cause is, for that the husband and wife are but one person in law, and are in like case as if an estate be made to two joint-tenants, where the one hath by force of the jointure the one moiety in law, and the other the other moiety, &c. In the same manner it is, where an estate is made to the husband and wife, and to two other men; in this case the husband and wife have but the third part, and the other two men the other two parts:" sect. 291. This construction, however, is not inflexible, where a manifest intention to the contrary is to be discovered in the will, as where in a bequest to husband and wife, and a stranger, the words "share and share alike," or "equally" are annexed to the gift: *Paine* v. *Wagner*, 12 Sim. 184; *Warrington* v. *Warrington*, 2 Hare, 54.

"Where the words can possibly have any construction put on them, all must be preserved." The scrupulous regard which Courts of equity extend to the intention of a testator, has produced the doctrine of cy pres. The aid of this doctrine is only invoked in the interpretation of wills, and chiefly in those in which the testator has endeavoured to infringe the rule against perpetuities. By the law as it has been laid down in the great case of *The Duke of Norfolk*, 3 Ch. Ca. 35, and finally settled in *Cadell* v. *Palmer*, 7 Bli. N. S. 202, no man can tie up an estate for any period beyond a life or lives in being, and twenty-one years afterwards. The application of the doctrine now under consideration is confined to those cases only where the particular intent, as expressed in the will of a testator, transgresses the rule of law, and the Court applying the maxim, "Benigne sunt faciendæ interpretationes cartarum propter simplicitatem laicorum ut res magis valeat quam pereat," Co. Lit. 36*a*, so construes the limitation that the general intent may be effectuated. "Cum quod ago non valet ut ago valeat quantam valere potest," Shep. Touch. 84. The leading authority on this head is *Humberston* v. *Humberston*, 1 P. Wms. 332: there the intention evidently was to transgress the limits of the law, and was carried out to its utmost verge. The motive for the exercise of this equitable rule of construction is thus concisely explained. "In order," says Sir *James Wigram*, "to preserve and effect something which the Court collects from the will to have been the paramount object of the testator, it rejects something else which is regarded as merely a subordinate purpose, namely, the mode of carrying out that intention:" *Vanderplank* v. *King*, 3 Hare, 11. The case of *Pitt* v. *Jackson*, 2 Bro. C. C. 51, was the

first in which the doctrine was extended to reform a limitation, under an excessive execution of a power; the power being to appoint lands amongst children, the donee appointed in trust for the separate use of his daughter for life, remainder to trustees in trust to preserve, &c., remainder to all the children of his daughter, as tenants in common, with remainders over; the limitation was moulded so as to effectuate the general intention, by giving the daughter an estate tail; see also *Stackpoole* v. *Stackpoole*, 4 Dr. & War. 320. It must, however, be borne in mind that the doctrine of cy pres is not to be applied to the rescue of every void or illegal limitation. Thus, for instance, the doctrine which modifies the rule in the case of wills, is not applicable to limitations by deed; *Adams* v. *Adams*, Cowp. 651; *Brudenell* v. *Elwes*, 1 East, 451; nor to limitations of personal estate even in wills; *Routledge* v. *Dorril*, 2 Ves. jun. 364; nor, it would seem, to the disposition of a mixed fund of real and personal estate; see *Boughton* v. *James*, 1 Col. 26; nor where, by the general and particular intent, it is manifest that the testator contemplated a complete and perpetual violation of the rule against perpetuities, as in the limitation of successive life estates to the issue of a person not in esse; *Somerville* v. *Lethbridge*, 6 T. R. 213; *Beard* v. *Westcott*, 5 B. & A. 801; nor where the effect of the limitation to the children of the unborn person would be to give them an estate in fee simple; *Bristow* v. *Warde*, 2 Ves. jun. 336; nor will the doctrine be applied to limitations which do not urgently call for such a construction, although in the same will there may be limitations to other members of the family which do require it; thus, where there was a devise to A. for life, and after her decease to all her children, begotten or to be begotten, for their respective lives, with remainder to the children of such children in tail, it was held that inasmuch as a child of A. born after the testator's death could not take as a purchaser, the intent of the testator would best be effectuated by conferring an estate tail on such afterborn children, according to the rule of cy pres, without interfering with the limited interests which the other children took under the same will, and which it was competent for the testator to have so abridged: *Vanderplank* v. *King*, 3 Hare, 1. The only other application of the doctrine of cy pres occurs in cases of dispositions of personal estate to charitable purposes. Thus it is a well established rule in equity, that where the purpose indicated is clearly charitable, the bequest shall not fail on account of the uncertainty of the object; *Att.-Gen.* v. *Peacock*, Finch, 245; *Att.-Gen.* v. *Comber*, 2 Sim. & St. 93; *Mitford* v. *Reynolds*, 1 Phill. 185; *Nightingale* v. *Goulburn*, 5 Hare, 484; nor where the intended object of the legacy has ceased to

exist; *Att.-Gen.* v. *The Ironmongers' Company*, 2 Beav. 313; nor when the charity is against the policy of the law; *Att.-Gen.* v. *Baxter*, 1 Vern. 248; *Da Costa* v. *De Pas*, Amb. 228; but the intention being charitable, will be effectuated either by the King by his sign manual, or by the Court; by the former when the indefinite purpose is unaccompanied by the intervention of any trustee; by the latter, where trustees are interposed but the specific objects are nevertheless not pointed out: *Moggridge* v. *Thackwell*, 7 Ves. 36. For the principles by which the Court is actuated on the application of this doctrine, see *The Att.-Gen.* v. *The Ironmongers' Company*, on appeal, Cr. & Ph. 222; *S. C.* 10 Cl. & Fin. 908. Suffice it, however, to say that the Court will not "decree execution of a trust of a charity in a manner different from that intended, except so far as they see that the intention cannot be executed literally; but another mode may be adopted consistent with his general intention, so as to execute it, though not in mode, in substance:" *Att.-Gen.* v. *Boultbee*, 2 Ves. jun. 388. Wherever there is a positive violation of the Statute of Mortmain (9 Geo. II. c. 36) the doctrine is held to be inapplicable; and even where a money legacy is duly given, but in connection with a devise of lands to the same object, which is in contravention with the provisions of that statute, the whole purpose fails, and the entire disposition is frustrated: *The Att.-Gen.* v. *Hinxman*, 2 J. & W. 270.

JORDAN *v.* FOLEY.

A WOMAN entered into a bond, and after married, having brought her husband a very considerable fortune. The husband constantly paid the interest of the bond during the life of the wife; now a bill is brought against the husband for the payment of the bond, and 1 Ch. Ca. 295 was cited; and that having paid the interest was a taking of the debt upon himself.

* To which it was answered and resolved, that the husband is only chargeable for what is sued for and recovered in the life of the wife; this is the clear law of the land, and unalterable but by Act of Parliament; and for that reason no room for equity to interpose, let the wife have brought ever so large a fortune. [* 20.]

And no room for equity to arise from having paid the interest, for during her life was obliged to have paid both the bond and interest; and his paying one will not make him chargeable with the other. There was a case in Lord Keeper *Wright's* time, where a woman bought goods, after married, and these goods came to the hands of the husband, yet was not charged for them. He is not liable either in law or equity.

Bill dismissed, but without costs.

The very being or legal existence of the woman was, by the ancient common law, suspended during the continuance of marriage, 1 Bla. Com. 442, which gives an absolute right to the husband in all his wife's chattels personal in possession, a qualified right to her choses in action; *Lannoy* v. *Lannoy*, post, p. 48; and a conditional right to her chattels real if he survive her, irrespective of his right to alien them at his pleasure during her lifetime: Co. Litt. 300*a*. The husband becomes liable for all the debts and obligations of his wife, even for those incurred before the coverture: but as the liability is incurred by the marriage, so unless it is enforced against him during the lifetime of his wife, he is discharged from it in the event of his surviving her, and this is the rule without reference to the amount of fortune which she may have brought; *Earl of Thomond* v. *Earl of Suffolk*, 1 P. Wms. 466; and the reason is, that by marriage he adopts this liability if she brings him no portion. Should the husband die before the debts due from his wife can be enforced against him, her original liability survives, and his estate is absolved: *Woodman* v. *Chapman*, 1 Camp. 189. In one case only can the husband surviving be responsible for the debt of his wife before marriage, and that is in the event of his becoming her administrator, and then only to the extent of the sum he may have received of her estate in such capacity: *Heard* v. *Stanford*, Ca. t. Talb. 173.

In the beginning of the last century the separate existence of property in a married woman was first established, and the case of *Bennet* v. *Davis*, 2 P. Wms. 316, is usually referred to as the earliest authority recognising the existence of this species of estate. There the enjoyment of property by a woman independent of marital control was fully secured to her, even without the intervention of a trustee, and subsequently equity has considerably enlarged the protection attaching on its own

creature, "separate estate:" *Parker* v. *Brooke*, 9 Ves. 583; and see *Newlands* v. *Paynter*, 4 Myl. & Cr. 408, where the separate estate in personal chattels, as household furniture, was upheld; see also *Anderson* v. *Anderson*, 2 Myl. & K. 427; *Davies* v. *Thornycroft*, 6 Sim. 420; *Ex parte Killick*, 3 M. D. & D. 480. It is somewhat singular that the first extension of the doctrine, so as to afford the protection against a future, as well as an existing husband, is to be found in a case at common law; *Beable* v. *Dodd*, 1 T. R. 193; but notwithstanding the authority of that case, two questions arising out of this species of property have long been agitated and have only recently been set at rest. The first, which involves the correctness of the decision in *Beable* v. *Dodd*, viz., whether the separate estate in property could be so limited as to inure during a coverture posterior to the gift; and, secondly, whether, admitting the efficacy of such a limitation, it was competent for a settlor to annex to the gift a clause against anticipation, which, though inoperative to derogate from a gift to a woman dum sola, should be valid and binding during a future coverture. Both these propositions were finally settled by Lord *Cottenham*, in the case of *Tullett* v. *Armstrong*, 4 Myl. & Cr. 390, affirming the judgment of Lord *Langdale*, who, after recapitulating the authorities on the subject, lays down the following rules as deducible therefrom:

"That property given to a woman for her separate use, independent of any husband, may under the authority of this Court be enjoyed by her during her coverture as her separate estate, although the property originally, or at any subsequent period or periods of time, became vested in her when discovert. That in respect of such separate estate, she is by this Court considered as a feme sole, although covert. Her faculties as such, and the nature and extent of them, are to be collected from the terms in which the gift is made to her, and will be supported by this Court for her protection. The words 'independent of a husband,' whether expressed or implied in the terms of the gift, mean no more than that this Court will not permit the marital power of the husband to be used in contravention of the enjoyment of the property, according to the terms of the gift. If the gift be made for her sole and separate use, without more, she has during the coverture an alienable estate independent of her husband. If the gift be made for her sole and separate use, without power to alienate, she has during the coverture the present enjoyment of an unalienable estate independent of her husband. In either of these cases she has, when discovert, a power of alienation; the restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture; whilst the woman is discovert, the separate

estate, whether modified by restraint or not, is suspended, and has no operation, though it is capable of arising upon the happening of a marriage. The restriction cannot be considered distinctly from the separate estate, of which it is only a modification; to say that the restriction exists, is saying no more than that the separate estate is so modified; the donor, in giving the woman when married some of the faculties of a feme sole, has withheld the power of alienation under the terms of the gift; and by the aid of this Court, the woman is a feme sole as to the present enjoyment of the property, but no further; measuring her faculty by the terms of the gift, she is not a feme sole as to the disposition of her property in anticipation of her intended provision. If there be no separate estate, there can be no such restriction as that which is now under consideration. The separate estate may, and often does, exist without the restriction; but the restriction has no independent existence; when found, it is as a modification of the separate estate, and inseparable from it:" *Tullett* v. *Armstrong*, 1 Beav. 32.

It was attempted to limit the application of the above rules to personal estate, on the ground that as by the common law, independent of equity, a woman could dispose of her real estate, equity ought not by its interference to control that power; but this reasoning did not avail, and the doctrine above laid down was held to apply to a limitation of real property, as well as to personal: *Baggett* v. *Meux*, 1 Phill. 627. The restraint, or, as it was termed by Lord *Brougham*, "the postponed fetter" (*Woodmeston* v. *Walker*, 2 Russ. & M. 207), is equally effective in Scotland: *Rennie* v. *Ritchie*, 12 Cl. & Fin. 204. Where it is obviously the intention of a testator that the legatee shall be restrained from anticipation, but in the instrument of gift the restrictive clause is only annexed to one of the modes whereby a disposition of the property may be effected, *e. g.*, to the power of appointing, it will not be competent for the legatee, when married, to alienate the property as if no restriction were imposed; *Brown* v. *Bamford*, 1 Phill. 620; overruling the judgment of Sir *L. Shadwell* (11 Sim. 127), who considered that she might, upon the ground that where the limitation in default of appointment is to the donee of the power, it is competent for him to dispose of the estate without regard to the power: see *Barrymore* v. *Ellis*, 8 Sim. 1.

It is obvious, that when property is bequeathed to or settled upon a married woman for her separate use, without any restraint upon anticipation, she may effectually dispose of it so as to conclude her if she survives; for in this case the Court regards her as a feme sole, and attributes to her the same powers of disposition as she would have had were she in fact a feme sole: *Hulme* v. *Tenant*, 1 Bro. C. C. 16; *Crosby*

v. *Church*, 3 Beav. 485; *Murray* v. *Dickenson*, Cr. & Ph. 48; *Smith* v. *Barlee*, 3 Myl. & K. 209; *Owens* v. *Smith*, 9 Beav. 80.

SOAM *v.* DANVERS.

June 5, 1725.

No new trial without Judge's opinion. Ante, pp. 13, 14.

LORD CHANCELLOR declared, he would never grant new trial, without the Judge's opinion; and shall have greater regard to the Judge and Jury than affidavits; on which will never examine into the trial.

See ante, *Hill* v. *Hill*, in notis.

CHRISTMAS *v.* CHRISTMAS.

[REHEARING.]

When agreement is reduced into writing, all previous treaties are resolved into that.

A WOMAN having lands and a personal estate, before marriage conveys all her estate to her separate use, to which the husband was a party; and he covenanted that he would not interfere with it. On this estate so conveyed there was a mortgage for 300*l.*, which before these conveyances he *verbally* promised to discharge: during the coverture the mortgage was assigned over, and he covenanted thus, "That I or my wife shall pay it." The husband and she lived with great affection together, and he constantly received all the profits of this separate estate. He died,

having never paid off the mortgage, leaving children, which he had by a former venter, fortunes: these the wife maintained after his decease.

The wife brings her bill.

1st. That the effects of the husband should be applied to the redemption of the mortgage.

2nd. To have account of the profits of her separate estate received by the baron.

[* 21.] * 3rd. To have an allowance for the maintenance of his children after his decease.

It was decreed, that husband's effects should not be charged to redeem the mortgage, nor be accountable for the profits of her separate estate received by him; and that the maintenance should be counterbalanced by the interest of their fortunes.

It was insisted in support of the decree, that whatever his promise was in respect of the mortgage, nothing is to be considered as his agreement but what is in writing. And that what he received was in a friendly manner; she stood by and never opposed it, so may be considered as a gift: had they been on ill terms, it had been otherwise. And as to the maintenance, it is the standing rule of the Court not to break into the principal.

CHANCELLOR.—There is no foundation to charge him with the payment of the mortgage; for by the Statute of Frauds, it is no charge unless reduced into writing; all is at an end when there is an agreement in writing; all the conversation before was only as previous steps; this is the ultimate settlement of the whole affair, on mature consideration of every thing; as between him and the mortgagee, might be charged, but not by the wife.

Where baron and feme live amicably together, and the husband receives her separate estate, it shall be supposed done by her consent.

As to the receipt of the separate maintenance, if live together amicably, shall look on it as done by her consent.

As to the maintenance, she has taken it upon herself,

and it does not appear to me but the interest is sufficient for that purpose. Decree affirmed.

All depositions taken in the cause may be read at a rehearing, though not read at hearing; aliter on appeal to the Lords.

N. B.—On the rehearing, depositions taken in the cause, but not read at the hearing, were opposed to be read now; but admitted to be read, as the constant practice of the Court, though in appeal to the Lords nothing is read but what was read below.

Ordered, that no application shall be made against the minutes after a week; and no further time to be allowed to petition for a rehearing but within a week after that.

If a person entitled to costs die before they are taxed, they are gone.

A bill was dismissed with costs, and the person who was entitled to costs died before they were taxed; there is no relief to be had in this case.

Lord Chief Baron *Eyre*, in the case of *Davis* v. *Symonds*, 1 Cox, 404, in remarking on the rules which exclude parol evidence to alter a written agreement, says: "The foundation of them is in the general rules of evidence, in which writing stands higher in the scale than mere parol testimony; and when treaties are reduced into writing, such writing is taken to express the ultimate sense of the parties, and is to speak for itself." It is to be observed, however, that although it has been the constant practice of our Courts of law and equity to reject such evidence as is plainly at variance with what the terms of a written contract import, yet it has been very long established that parol evidence is admissible to explain or affect the written contract. See *Lord Lucy* v. *Watts*, ante, p. 1. Wherever more or less than what was intended to be comprised is comprised in a written contract, there it is the especial province of equity to aid in rendering the instrument conformable to the intentions of the parties to the contract. *The Marquis Townshend* v. *Stangroom*, 6 Ves. 328; *Lord Irnham* v. *Child*, 1 Bro. C. C. 92. So, in the case of *Mortimer* v. *Shortall*, 2 Dr. &

War. 363, where by mistake a lease contained more than was intended to be demised, the instrument was rectified as to the overplus. See also, *Davies* v. *Fitton*, 2 Dr. & War. 225.

In the case of *Clifford* v. *Turrell*, 1 Y. & C. C. C. 138, affirmed, 9 Jur. 633, L. C., it was decided, that where there was one consideration stated in a deed, proof of an additional consideration was admissible, and that it was not in contradiction to a written instrument to prove a larger consideration than what appeared on the face of the deed. See also, *Van* v. *Corpe*, 3 Myl. & K. 269.

In the case of *Christmas* v. *Christmas*, upon the assignment of the mortgage, the husband covenanted "that he or his wife should pay it." Now it is quite clear that the husband's covenant could not be enforced at the suit of his wife, or by any other than the covenantee, or his representative: 2 Bac. Abr. 341. The only ground on which the wife could have proceeded was, that the husband's conduct, in receiving the profits of her separate estate and keeping down the interest on the mortgage, amounted to a part performance; but acts which are so construed in equity must be referrible to no other desire than that of performing the agreement which is sought to be set up; *Gunter* v. *Halsey*, Amb. 586; or they must be such as amount to fraud, unless the agreement be fully performed: *Clinan* v. *Cooke*, 1 Sch. & Lef. 41.

Second resolution.—It is well settled, as laid down in the second resolution, that when a wife without objection sees her husband receive her separate property during his lifetime, she shall be precluded from reclaiming any part of it after his death; and this principle has been repeatedly affirmed: *Powell* v. *Hankey*, 2 P. Wms. 84. "Though the property," says Lord *Rosslyn*, "was settled to the wife's separate use, yet if she permits the husband to spend the income, he is not accountable:" *Smith* v. *Lord Camelford*, 2 Ves. jun. 716. The rule, as applicable to the separate estate of the wife, is more stringent in the case of pin-money. In the case of an acquiescence by the wife to a non-payment of pin-money, it is firmly settled that she cannot claim the arrears upon it beyond a year: *Parkes* v. *White*, 11 Ves. 225. "The wife having the pin-money allowed her for the purpose of her apparel and pocket-money, the Court says, We will not suppose you to be above a year without the means of dressing yourself according to your rank, or paying your tradesmen's bills; but we will suppose that the year before, and in all preceding years, they were paid by the husband, and we know that if he has not paid them he is liable to pay them, being for necessaries according to his state and degree;" *Howard* v. *Digby*, 8 Bli. N. S. 252. In this respect pin-money is clearly distinguishable from separate estate, though they have been

sometimes confounded. The former is regarded in equity as payable de anno in annum for the paraphernalia of the wife, and during such time as the husband has provided her with clothes and other necessaries she is barred from recovering any arrears: see *Thomas* v. *Bennet*, 2 P. Wms. 341; *Fowler* v. *Fowler*, 3 P. Wms. 355. In the case of separate estate the inference in the husband's favour is derived from, and must be based upon, some evidence of consent on the part of the wife that her property should have been so appropriated: see *Beresford* v. *The Archbishop of Armagh*, 13 Sim. 643.

As to evidence on rehearing and appeals, see the notes to *Colchester* v. *Colchester*, ante, p. 13; and as to revivor for costs, see *Thorn* v. *Pitt*, post, 54.

*HILL v. FILKIN. [*22.]

June 8, 1725.

Devise to a Papist who is under the age of eighteen, may conform any time under the age of eighteen and a half, to prevent the disability created by 11 & 12 *W.* 3, *c.* 4.

ANNE STEPHENSON, a Papist, devised lands to be sold, and the money which arose from the sale to Frances, to be paid at the age of twenty-one, or day of marriage, which should first happen. Frances was a Papist at the time of the devise, and at the time of the death of the devisor; and also at the time of her marriage, which was solemnized according to the rites of the Church of Rome; but conformed to the Church of England, according to Act of Parliament, before the age of eighteen, as was found on several issues directed for that purpose: the heir at law insists on her being a Papist at the time of the devise and death of the devisor; and therefore that she is incapable to take by the 11 & 12 W. 3, c. 4.

The clause in which is as followeth:—"If any person educated in the Popish religion, or professing the same, shall not within six months after he or she shall attain the age of eighteen take the oaths of allegiance and su-

premacy, &c. Every such person shall, in respect of him or herself only, and not to or in respect of any of his or her posterity, be disabled and made incapable to inherit, or take by descent, *devise* or limitation, in possession, reversion or remainder, any lands, tenements or hereditaments in England; and that during the life of such person, or until he or she do take the said oaths, &c., the next of his or her kindred, which shall be a Protestant, shall have and enjoy the said lands, &c., without being accountable for the profits, by him or her so received during such enjoyment thereof as aforesaid, &c. And every Papist, or person making profession of the *Popish* religion shall be disabled, and is hereby made incapable, to purchase either in his or her own name, to his or her use, or in trust for him or her, any lands, &c. And that all and singular estates, terms, and any other interests or profits whatsoever out of lands, from and after, &c., to be made, suffered, or done to, &c., for the use and behoof of any such person or persons, or upon any trust or confidence mediately or immediately, to or for the benefit or relief of any such person or persons, shall be utterly void and of none effect, to all intents, constructions and purposes whatsoever."]

It was argued for the next Protestant heir, that the words of the Act are to be so taken, that what is not in the first clause is in the second; and then the question will be, [* 23.] whether * a person, professing the *Popish* religion at the time of the devise, be capable of taking.

An infant educated in the *Popish* religion, of so tender years as not to be capable of *professing* any religion, shall be within the first clause, which is only a qualified disability; but where can profess, as here is done, in the most solemn manner, by marriage according to the rites of the church, which with them is a sacrament, shall be within the second clause, which is an absolute disability. In *Roper* and *Ratcliff's* case it was controverted, whether a devise was a purchase; and held it was, in opposition to descent, and there no distinction of ages taken; and there also resolved, that a Papist can no more take money devised out of lands than lands themselves. Lord *Macclesfield* was of

opinion, that if the infant was of such an age, that could profess a religion, it was within the second clause, if not, within the first; the second clause is general, and the first will be operative to infants of tender years.

On the other side it was argued, That the design of the Act was to draw persons to conform, and to hinder Papists from enlarging their possessions; the first are infants, which are treated with great lenity and tenderness, and allowed till eighteen and a half to forsake their errors, before they grow rigid and hardened; the others, who are adult persons, are treated in a different way, out of necessary policy to prevent an increase of Papists' possessions; if the construction on the other side were to prevail, an infant of five years old might be within it; for there can be no rule to know when children are capable of professing a religion; it would vary according to the degree of their respective understandings; this would be creating a forfeiture by an infant. "Devise" in the first clause could have no operation, if it were to be taken in the manner contended for; "purchase" is not to be taken in a legal but a vulgar construction, as appears in the case of Lord *Derwentwater* before the Lords; he was a tenant in tail, and suffered a common recovery to settle his estate; it was strongly insisted he took as a purchaser, but the Lords considered it only as a settlement of his own estate, and not as a purchase.

Chancellor.—These are not two but one clause; devises in the case of *Roper* and *Ratcliff* were construed purchases, and justly, else the Act had been eluded; yet not so as that all devises are to be considered as purchases, as to incapacitating. * If a devise be made to one under eighteen and a half, if conforms within the age of eighteen and a half, shall have the estate; both parts of the clause are general, all who are not included in the first part are in the second part; for if the second part extends to all purchases, the first part must be absolutely repealed, as to devises; and the words of Acts of Parliament must be construed so as to be consistent, and not to destroy each other; here it appears has conformed; so plainly within the first part of the clause. So bill dismissed with costs. [* 24.]

"The most natural and genuine exposition of a statute is to construe one part by another part of the same statute, for that best expresseth the meaning of the makers, and such construction is ex visceribus actus: Co. Lit. 381 *b*. That construction must be made of a statute in suppression of the mischief and in advancement of the remedy, for qui hæret in litera hæret in cortice: Co. Lit. 381 *b*." Applying these rules, and by an equitable construction of the statute, it was holden that inasmuch as the locus penitentiæ of recanting was open to every person until the attainment of the age of eighteen and a half, it would be a most harsh straining of the statute to prevent the vesting by devise of an estate, which, if it had descended, could not have been forfeited until the arrival of the period when the forfeiture by the statute was incurred. It is almost unnecessary to add, that the clauses upon which these questions arose are repealed by the 18 Geo. III. c. 60.

HAYWARD *v.* COLLEY.

On appeal the whole cause is open; aliter on rehearing, only so much as is petitioned against. Ante, p. 14.

THE rule of Court is, that on appeal the whole case is open; but on a rehearing, only so much as is petitioned against; if all do not petition, only to the petitioners it is open.

See ante, *Colchester* v. *Colchester*, in notis.

DUKE OF CHANDOS *v.* TALBOT.

Wife cannot put in a separate answer, without order.

SEPARATE answer put in by the wife alone, without order of the Court for that purpose, is irregular.

In an injunction cause, if either P. or D. dies, the Court must be moved to revive within a stated time, or the injunction will be dissolved.

In an injunction cause, where it abates by the death of either the plaintiff or defendant, the rule is, that the Court shall be moved to revive within a stated time, or the injunction be dissolved.

Where there is a demurrer, cannot have injunction till that is argued.

On a demurrer, it is the settled rule of the Court, cannot move for injunction, for this reason; till the demurrer be argued it is not certain that the cause is in Court.

A bond, which by interlineation after execution is not a good bond at law, shall not charge an estate as a bond in equity.

A bond was put in suit against an executor, who pleaded plene administravit, that he was a bond-creditor himself, and had paid himself; on the trial it appeared there was an interlineation of fifty, after the bond was executed; so at law the bond was entirely void. Now application was made, that though the bond be void at law, that it may be considered as good in equity for what it was really given.

CHANCELLOR.—This at most can be a charge by simple contract, for you yourselves have destroyed its being as a bond, so it is as if it never had been; so can be no bar to the payment of a debt of a superior nature.

The general rule, where husband and wife are sued in equity, is that they should answer jointly (Mit. Pl. 105, 4th ed.), not jointly and severally, as is the case with two or more defendants, and the joint answer is considered as the answer of the husband alone, and the admissions are no evidence against the wife: see *Elston* v. *Wood*, 2 Myl. & K. 678. Whenever this rule is relaxed, either on the part of the

husband or wife, the previous sanction of the Court must be obtained (Mit. Pl. 104, 4th ed.); and if put in without an order, it may be taken off the file: Prac. Reg. 53; *Bunyan* v. *Mortimer* 6 Madd. 278. On this ground, where a husband had not obtained an order to answer separately, and no joint answer had been put in, the Vice-Chancellor declared the husband's separate answer ought to be treated as a nullity (*Bilton* v. *Bennett*, 4 Sim. 17; *Gee* v. *Cottle*, 3 Myl. & Cr. 180), and the wife's answer alone without the husband is no answer; *Ward* v. *Meath*, 2 Ch. Ca. 173; but if filed with the husband's approbation, and accepted by the plaintiff, it will not be deemed irregular, upon objection taken by him, merely for want of the order for leave to file a separate answer: see the report of the principal case in 2 P. Wms. 371. The exceptions to the rule requiring a joint answer, are where the wife claims in opposition to her husband; *Brooks* v. *Brooks*, Prec. Ch. 24; or cannot conscientiously consent to the answer as framed by him; *Ex parte Halsam*, 2 Atk. 50; and if she obstinately refuses to join in answering with her husband, she may be compelled to answer separately; *Pain* v. ———, 1 Ch. Ca. 296; *Garey* v. *Whittingham*, 1 Sim. & St. 163; but if she has appeared and obtained an order to answer separately, she will not be allowed to insist on the irregularity: *Travers* v. *Bulkeley*, 1 Ves. 384. The sanction of the Court will be dispensed with in cases where the husband is plaintiff in a suit and makes his wife a defendant; for in this case the plaintiff treats her as a feme sole: *Ainslie* v. *Medlicott*, 13 Ves. 266. Where a married woman is an infant, her answer cannot be taken either separately or jointly with her husband until she has had a guardian assigned: *Colman* v. *Northcote*, 2 Hare. 147.

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Second resolution. — Where a suit abated by the death of one of two co-plaintiffs, the cause having been at issue, it was ordered that the survivor should revive within a fortnight, or that the bill should be dismissed with costs; *Chichester* v. *Hunter*, 3 Beav. 491; but, where the abatement arose from the death of a sole plaintiff, there was some doubt as to whether there could be an order upon her representatives to revive within a limited time; *Canham* v. *Vincent*, 8 Sim. 277; *Chowick* v. *Dimes*, 3 Beav. 294; but now, by the 63rd Order of May, 1845, "In cases where a suit abates by the death of a sole plaintiff, the Court, upon motion of any defendant made on notice served on the legal representative of the deceased plaintiff, may order that such legal representative do revive the suit within a limited time, or that the bill be dismissed."

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Third resolution.—For, as the demurrer insists that the plaintiff has

no equity, it might be most unjust to the defendant to issue the injunction until the demurrer has been disposed of: see also *Cousins* v. *Smith*, 13 Ves. 164. But the Court will accelerate the argument on the merits of the demurrer if the justice of the case requires it; *Jones* v. *Taylor*, 2 Madd. 181; so also in the case of a plea: *Anon.*, 2 Atk. 113. On a similar principle, where an evasive answer has been put in, the Court will itself judge of its sufficiency, or otherwise, if the injunction to stay trial depends upon the sufficiency of the answer: *Scotson* v. *Gaury*, 1 Hare, 99.

Fourth resolution illustrates the maxim, that "equitas sequitur legem." "Where," says Mr. Justice *Story*, "a rule of the common or the statute law is direct, and governs the case, with all its circumstances or the particular point, a Court of equity is as much bound by it as a Court of law, and can as little justify a departure from it:" 1 Story, Eq. Jur. 57; see *Kemp* v. *Pryor*, 7 Ves. 250, 251. On precisely similar grounds, a bill seeking to have a bond established against the obligor (the name of the obligee having been omitted), and charging that the bond was on that account void at law, was dismissed: *Squire* v. *Whitton*, 1 Ho. of Lords' Cases, 332. So, where the legislature had declared that, in order to effect the sale of a ship, the bill of sale should be in a prescribed form, and an instrument purporting to convey a ship was wanting in the formality required by the statute (the Register Act), a bill to rectify such instrument, so as to override the title of the assignees in bankruptcy of the vendor, who since the contract had become bankrupt, was dismissed: *Hibbert* v. *Rolleston*, 3 Bro. C. C. 571. So, also, if the legal remedy which has once existed has been lost by lapse of time, equity will not relieve: *Ferrand* v. *Wilson*, 4 Hare, 384.

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*LYSONS *v.* VERNON. [*25.]

June 24, 1725.

[INNER-TEMPLE HALL.]

A jointure made of houses then in lease at a small rent, but computed as worth so much more, which they would be when the lease expired, and covenant to pay quarterly a sum of money to amount to the computed value; that money shall be paid as a sum in gross, and not liable to taxes.

A JOINTURE was made of several lands and houses which were reckoned at 108*l.* per annum; but being then

in lease the rent reserved was only 17*l.* 12*s.* per annum; but would be worth 108*l.* per annum, when the lease expired, which it would do in five years. The husband covenants, that she should be paid 22*l.* 12*s.* quarterly, to make the present rent up 108*l.*

Several quarters' rent were in arrear, so bill is brought for the payment of them, with interest from the time the several quarters' rents respectively became due; which it was insisted was reasonable, because, this being for maintenance, for want of it, would be obliged to take up money at interest, or to buy goods on credit, for which must therefore give an advanced price, very probably much superior to the interest. Payment of interest was not much disputed on the other side; but strongly insisted on, that a deduction for taxes should be made out of the quarterly payment of 22*l.* 12*s.* which was given to make up the rent 108*l.* which the houses would be in five years; which rent, as it would then be liable to taxes, so should this sum which the husband charges himself with the payment of, instead of the tenant, so she should receive it as if it had been from the tenant, and then had been liable to taxes: this is not to be considered as a personal covenant, but really a settlement of the houses; and if the lease had expired in the husband's life, she really would have had the houses, which would have been liable to taxes; the design was to put her in as good a condition before the rent was advanced, as if it had been actually advanced, but not in a better.

CHANCELLOR.—I know nothing what was the intent; I see here a specialty, whereby a man obliges himself to the payment of 22*l.* 12*s.* quarterly, for which I do not find he paid any taxes, so can allow none: and this being a personal covenant for the payment of sums in gross, interest must be allowed from the time each respective sum became due.

The doctrine of Courts of equity with respect to the allowance of interest on the arrears of annuities, when substituted for jointures, is

founded upon this, viz., that interest is allowed by way of maintenance, and as a compensation for the debts which the wife may have contracted in the mean time: *Ferrers* v. *Ferrers*, Fort. 2: but the rule is not, even in such cases, universal, as the Court will expect a special case to be made, *e. g.* the being obliged to borrow money and to pay interest for it, and then the Court will give interest from a reasonable time: *Anon.* 2 Ves. 661.

The statement, in the case of *Lysons* v. *Vernon*, that, because there "was a personal covenant for the payment of sums in gross, interest must be allowed from the time each respective sum became due," must be accepted with qualification, and since the case of *Creuze* v. *Lowth*, 4 Bro. C. C. 316; *S. C.* 2 Ves. jun. 157, sub nomine *Creuze* v. *Hunter*, which is the leading authority on the subject, there has been no instance of such an allowance except under peculiar circumstances; as where the grantor is obliged to come into equity to be released, against the legal rights of which the annuitant has availed himself; *Robinson* v. *Cumming*, 2 Atk. 411: or, where the grantee has been restrained by injunction from enforcing his legal rights, and then only from the period of such restraint; *Morgan* v. *Morgan*, Dick. 643: so, where annuities had been secured by bond or warrant of attorney on which judgment had been entered up, and, on the death of the grantor (the annuities being greatly in arrear,) the annuitant proceeded against the assets of the grantor, which consisted of a fund in court, the Vice-Chancellor of England, in decreeing payment of the annuity with interest (though only from the death of the grantor), observed, that the case was one between creditors and a dry legal administrator; that the fund in court had been accumulating for many years, and that it would be contrary to the plain justice of the case (if this Court was to exercise a discretion) that it should not allow these parties interest on the amount of the arrears of the annuities: *Hyde* v. *Price*, 8 Sim. 578. So, where a person bound to pay an annuity, having been party to the deed creating it, had been guilty of gross misconduct, both in opposition to the Court and in his endeavours to evade the payment of the annuity, interest was decreed against him; *Martyn* v. *Blake*, 3 Dr. & War. 125; but in that case there was a covenant to indemnify the annuitant against the effect of prior incumbrances, and as the annuity was obstructed by such incumbrances, and in consequence of the acts of the grantor, the Court, in order to prevent circuity of action, gave interest upon the arrears, which would only be the measure of damages if recourse was had to law to recover damages: *Ib.* The propriety, however, of this decision has been impugned by Lord *Cottenham*, who decided that the mere covenant to indemnify against costs, charges, damages, and expenses, would not

afford a ground for a Court of equity to presume a contract for, or to allow, interest; observing that "damages may no doubt be an equivalent for interest, but the two things are not only not the same, but are of a precisely opposite nature. Interest contracted for is due under the contract and in pursuance of it, but damages are a compensation for a breach of the contract:" *Booth* v. *Leycester*, 3 Myl. & Cr. 465.

Where the grantee of an annuity is proceeding against the grantor, the latter cannot be required to secure and appropriate a sum to answer the growing payments; for "the very principle of granting an annuity is, that a man may be able to pay by degrees what he has no means of paying at once:" *Cooke* v. *Wiggins*, 10 Ves. 192: where, however, the suit is against the assets of a deceased grantor, security will be directed to be given if the amount is a charge on the real estate, by ordering a sufficient part of the real estate to be set apart for securing the growing payments: *Newman* v. *Auling*, 3 Atk. 579: and, where it is a charge upon the personalty, by a direction to set apart and appropriate a sufficient part of the deceased's personal estate to answer such annuity: Seton on Decrees, 66.

With respect to the allowance of interest, generally, the judgment of Lord *Ellenborough*, in the case of *De Havilland* v. *Bowerbank*, 1 Camp. 51, gives a clear exposition of the law. "It appears to me," says his Lordship, "that interest ought to be allowed only in cases where there is a contract for the payment of money on a certain day, as on bills of exchange, promissory notes, &c.; or where there has been an express promise to pay interest; or where, from the course of dealing between the parties, it may be inferred that this was their intention; or where it can be proved that the money has been used, and interest has been actually made." In the case of *Lysons* v. *Vernon*, there having been a covenant for the payment of money on *a certain* day, interest was allowed, and on this ground it is held that a promissory note is not satisfied in law or in equity without the payment of interest; but, except under special circumstances, interest will not be allowed in equity on a judgment, because it is satisfied both at law and in equity without the payment of interest, which however may be recovered at law in the shape of damages: *Gaunt* v. *Taylor*, 3 M. & K. 302.

By the 46th Order of August, 1841, a creditor, whose debt does not carry interest, who shall come in and establish the same before the Master under a decree or order in a suit, shall be entitled to interest upon his debt at the rate of 4*l.* per cent. from the date of the decree out of any assets which may remain after satisfying the costs of the suit, the debts established and the interest of such debts as by law carry interest.

*PIGGOT *v.* MORRIS. [* 26]

Legacy devised to A. to be paid at the age of twenty-one, or marriage, which shall first happen, so as such marriage be with the consent of B., if not, devise over: A. marries without consent, and dies before twenty-one; the legacy is gone.

ONE Sands made his will, and gave his four daughters particular sums of money, and then in the will says, "All the rest and residue of all my personal estate not bequeathed, to my four daughters, Judith, Sarah, Elizabeth and Anne, equally; and I order the several sums before given to my daughters, and likewise their several parts of my personal estate, and what other money may become due to them out of my personal estate, *shall be paid them respectively at their age of twenty-one or marriage, which shall first* happen, *so as* such marriage shall be with the consent of my brother Brown, if he be then living; and if any of my said three daughters (N.B. one was then married) shall happen to die *before her or their respective age* or marriage, as aforesaid, in such case I give the legacy of her or them so dying, as aforesaid, to and between the survivors of my four daughters equally."

One of the daughters married in the life of Brown without his consent, and died before the age of twenty-one, leaving issue.

Her representative brings a bill for this legacy.

It was insisted, that this was a vested legacy, and that the condition is only annexed to the time of payment, which is not a condition precedent but subsequent, which being to defeat an estate, is to be taken as strictly as possibly it can. Legacies are governed by the rules of the civil law; and by that law, conditions in restraint of marriage are void; in respect of legacies, this and the spiritual Court have a con-

current jurisdiction; and therefore, for the sake of uniformity, must be governed by the same rules, else the right would be variant according to the Court in which the suit was instituted; such devises as these, within the intent of the testator, are not meant as punishments, but monitory restraints, to take proper advice in an affair of so much consequence as marriage; and not to tend to the destruction of the person whose interest he appears so solicitous for. It is very observable, that in the devise over there is no consent required; here it does not appear she had notice of the will, which is necessary, else she might act contrary to it, without knowing she did wrong. It is absurd
[* 27] to say she should conform to the terms imposed on *her, without knowing what they were; for obedience ever implies a previous knowledge of the duty.

On the other hand it was argued, that the arrival at the age of twenty-one, or marriage with consent, must be a condition precedent. "As aforesaid" are words of relation, and if they do refer, they refer as much to age as marriage, and then there is a devise over; and no case can be produced, where there is a condition with a limitation over, where that has not been held good, and must be pursued, or a forfeiture will arise: it may be allowed, that by the civil law, that a condition absolutely in opposition to marriage may be void, and the devise be absolute; but not where it is only a conditional restraint; and marriage may be had, and those restrictions observed. A condition not to marry *at all* is void by their law, as marriage is looked on as a sacrament; but where only a partial restraint, as not to marry a widower, or a person of a particular name or complexion, the condition is good by their law. *Swinburn*, 243.

But admitting the condition was void by their law, it does not follow it is void by ours; for their rules are no further rules than they are received; as by the ecclesiastic law, interest is not given for legacies, because with them it is usury, but here interest is given; they are not used here as being ecclesiastic rules, but our rules; so though they may happen to be their rules ex accidenti, they are followed

only as being ours; and therefore quite immaterial to insist on their rules; must show the usage in this Court.

And by the constant practice of the Court, and various cases, where a personal legacy is given on a condition and limitation over, if the condition is not pursued, it is a forfeiture, and no relief can be had; for there a third person's interest is concerned, and no room for a Court of equity to relieve; for it would be doing an actual injury to another person. *Cray* and *Wilson*, May, 1706. Personal legacy given on condition to marry with consent, else given over; on appeal to Lord *Cowper*, held to be a forfeiture, because given over; so *Ashton* v. *Ashton; Hyde* v. *Livian.* The condition indeed in the case of *Fleming* v. *Walgrave*, 1 Ch. Ca. 58, was plainly void, because the person who was to give consent was to receive benefit by not doing it.

As to not having notice of the condition in the will; every one is obliged to take notice of a condition, where no person is obliged to give notice of it; as was resolved in the case of *Porter* v. *Fry.*

CHANCELLOR.—This is not to be considered under the notion of a forfeiture; it is merely a legacy given, and two days of payment appointed, with a devise over; and the person dies before the time the legacy grew due; so decreed that, she dying before marriage with consent, or twenty-one, an account to be taken of her part, and that that, and the improvements of it, be paid to the surviving sisters. [28]

In the case of *Piggot* v. *Morris*, there being a clear and unequivocal ulterior gift over to another party, in the event of the first legatee dying without fulfilling either of the conditions annexed to the vesting of the legacy, it is obvious that there could be no question as to the conditions being precedent or subsequent; for though, as we have seen (vide *Nutt* v. *Burrell*, ante, p. 1, in notis), that, in the absence of any ulterior gift, much may depend on whether the condition is subsequent and imposed only in terrorem, or strictly precedent, such a question can never arise where a provision is expressly made for the event, which eo instanti, transfers the gift to the ulterior legatee:

Christ's Hospital v. *Grainger*, 1 Mac. & Gor. 460. One peculiarity is to be observed with reference to the terms of the bequest in *Piggot* v. *Morris*, viz., that it is given over upon a double contingency; the rule with respect to the construction of which in equity is, that if the legatee has attained the prescribed age, the condition as to consent will be referred to a marriage under the particular age; for, "It is very unnatural," says Lord *Camden*, "for a parent to impose a consent to marriage during his daughter's whole life:" *Knapp* v. *Noyes*, Amb. 662.

COPPIN *v.* COPPIN.

June 25, 1725.

[INNER TEMPLE HALL.]

A. sells an estate to B. who pays part of the purchase-money; he dies making A. executor, who is his heir at law: A. may retain out of the personal estate for the purchase-money, though thereby creditors suffer.

ONE Coppin lived at Aleppo, where he failed, and got his debts compounded at 10*l.* per cent., and had releases in full. He after went into Persia, where he acquired a considerable estate; and having a mind to have some land in England, he wrote to his brother John, the defendant, to look out for the purchase of an estate of about 300*l.* per annum value; who informed him by letter, that he had an estate of his own to dispose of about that value, for which he would take twenty years' purchase, at which rate it amounted to 5400*l.* to which the brother in Persia by letter agreed, and conveyances were made to him, but remained in the hands of the vendor the defendant; only 1200*l.* part of the purchase-money was paid. He makes his will, in which, after having given several legacies, he says, "Whatever else shall remain in money, land or goods, I give to my brother John Coppin, whom I ordain sole executor,

only out of that he must pay what I owed at Aleppo to my creditors, who were so kind to compound their debts at 10*l.* per cent., which remainder of those debts shall be paid without interest. I now order and appoint my executor to pay those debts, three years from this date, out of the residue." This will signed only by two witnesses, so not good to pass lands by the Statute of Frauds, on which the brother insists, and claims by descent, and not by the devise; and being executor insists to retain for the residue of the purchase-money of that estate he sold his brother, out of the personal estate.

It was insisted, that the vendor having the writings in his hands, will be looked on as having the estate in his hands as a pledge for the payment of the purchase-money; and that if the vendee had died leaving no personal estate, the vendor would be entitled to payment out of the real estate, and could not be compelled to deliver the deeds till *payment, for which the estate is security; and then this brings it to the common case, that where a particular debt charges both real and personal estate, and another charges only the personal, the debts shall be so marshalled that all shall be paid; and though the creditor cannot have his security restrained, yet if he has recourse to the personal estate, whereby the personal estate is exhausted, the other creditors will stand in his place to affect the real. [* 29]

But besides this, it has been always held, that suffering lands to descend is a satisfaction for a debt due; as it would be unnecessary to put a person to the trouble of a particular disposition, since the creditor receives the same benefit by its not being done, as if it actually had.

It was insisted, that the compounding creditors should be considered, not as legatees, but creditors, and have a priority of payment. Legacies are mere acts of bounty, which flow from the munificence of the testator, and which the legatee had no right to demand; these compounded debts were ever debts in honour and conscience; though by the intervention of the release could not be legally compelled to pay them, yet in conscience he was bound to do it. It is the same as a debt barred by the Statute of Limitations; where

if a man orders all his debts to be paid, those barred by the statute shall be paid too, for they are debts in conscience; and the statute does not bar the right but the remedy, which the party may, or may not, make use of.

To this the Chancellor said, he would not consider debts barred by the statute, by such a declaration set up again.

Which declaration, I believe, gave occasion to the case of *Blackway* v. *Earl Strafford*, postea.

To which it was answered, as this is a debt, it must be paid out of the personal estate, as that is the proper fund for debts. Suppose only articles had been entered into, and the vendor dies before conveyance executed, the heir shall be obliged to convey, though the executor shall receive the money. To make the real estate chargeable in his hands as a deposit, would be running foul of the Statute of Frauds; as it would be charging the land without such solemnities as by that is required. The deeds remain in his hands not as vendor, but agent for the vendee.

As to the second point, the compounding creditors are not to be considered as debts, but as legacies; for if considered as debts, it would be putting them on an equal foot with the real, legal subsisting debts of the testator; it would be putting it in the testator's power to create a new
[* 30] *set of creditors (whose right was absolutely barred by their own act), to participate of that fund which the law has made liable to debts; which suppose it were exactly sufficient to pay the debts, if these compounding creditors are to be brought in as debts, then the whole of the debts could not be paid; so it would be putting it in the testator's power to take away that right which the law has established.

But the testator is so far from considering them as debts, that they are to be paid after all other legacies; for no time being appointed for the payment of the legacies, they are immediately payable; and these not to be paid till three years, and that out of the residue.

Chancellor.—On reading the bill, the compounding creditors only pray to be paid pari passu, as the legatees, so can decree no more than they ask; and then the direction

of the will must take place, by which are to be paid after the other legatees: what creates the intricacy of this case is the defendant's being in so many different capacities, vendor, heir, executor and agent for his brother; though the person be the same, the capacities are different, and must be considered as if in several persons. If vendee dies before all the purchase-money paid, the vendor may come against the executor for the money, though the heir is to have the benefit of it: suppose yet a stronger case; vendee who has paid part of the purchase-money dies, makes an executor, and the vendor is heir at law, the vendor will have the residue of the purchase-money against the executor, though it be so much for his benefit; and that is the case here; so must have the residue of the purchase-money.

Lord *Hardwicke*, in *Lanoy* v. *Duke of Athol*, 2 Atk. 446, says, that "it is the constant equity of this Court, if a creditor has two funds he shall take his satisfaction out of that upon which another creditor has no lien;" and, in a subsequent case, the same learned Judge says that there is not a more useful power in the Court of Chancery than that exercised in marshalling assets and funds; *Hanby* v. *Roberts*, Ambl. 128; independently of authority, there is abundant reason for the rule which prevents one man's claims from being subject to the caprice of another, "nemo debet locupletari ex alterius incommodo;" Jenk. Cent. 4. The only qualification, which has attached to the indisputable doctrine laid down in *Lanoy* v. *Duke of Athol*, occurs in the case where the proposed adjustment of the double claims cannot be made without trenching upon the rights of third parties; this principle is to be extracted from the decision in *Coppin* v. *Coppin*, and though that case has been somewhat shaken by the later authorities, it first appears to have recognised this distinction, that where the result of transferring the lien of the unpaid vendor to a creditor or legatee of a deceased purchaser would be prejudicial to a third party (*e. g.*, the heir of the purchaser), although a matter of indifference to the vendor, the ordinary equity to marshal no longer exists. In the case of *Coppin* v. *Coppin* the unpaid vendor happened to be the heir as well as the executor of the purchaser,

and thence the application of the above doctrine of equity became somewhat more intricate. It cannot be disputed that, qua vendor, it was perfectly immaterial to him from what source the unpaid purchase-money was to be derived; but, qua heir, he would undoubtedly be damnified in proportion to the extent that the inheritance was saddled with the cost of its purchase.

A review of the authorities bearing on this subject, and an examination of the principles upon which the rule as to marshalling is based, will enable us to see how far the judgment of Lord *King*, in *Coppin* v. *Coppin*, has been affected or impugned. In *Pollexfen* v. *Moore*, 3 Atk. 272, the heir of an executor who had been the devisee of lands unpaid for at the testator's death, and who had committed a devastavit, was held by Lord *Hardwicke* to take the lands, charged with such an amount of the purchase-money as was equal to the sum of which a legatee had been defrauded by the executor; in that case, the unpaid vendor was, ex concessis, indifferent as to the source from which his purchase-money was to be derived, while the equities of the contending parties were quite unequal, added to which, the unpaid vendor had by agreement kept possession of the title deeds, for securing the unpaid purchase-money, which alone, without reference to the fraud, would have been a sufficient reason for the decree: see 3 Sugd. Vend. and Pur. 208, 10th ed.

The first authority which can be said to have militated against the doctrine laid down in *Coppin* v. *Coppin* was that of *Austen* v. *Halsey*, 6 Ves. 475; the question however was not determined, though, in that case, Lord *Eldon*, after observing that it was clearly settled, that the vendor had a lien for the purchase-money, while the estate was in the hands of the vendee, and that such lien was in equity very like a charge, intimated his opinion that, where there was a charge upon an estate descended, a legatee might stand in the place of the person having that charge, and exhausting the personal estate. This case was followed by *Trimmer* v. *Bayne*, 9 Ves. 209, where the contest was between the heir and legatees, and Sir *William Grant* held that the latter were, as against the heir of the purchaser who had not paid his whole purchase-money, entitled to stand in the shoes of the vendor to the extent of the unpaid purchase-money. In neither of these cases was *Coppin* v. *Coppin* cited. In *Selby* v. *Selby*, 4 Russ. 336, Sir *John Leach* held that simple-contract creditors had a right to have recourse to the real estate devised, and to avail themselves of the unpaid vendor's lien as against the devisee; but such an equity was in vain attempted to be enforced by disappointed pecuniary legatees as against the devisee of the unpaid-for estate; *Wythe* v. *Henniker*, 2 Myl. & K. 635; contra *Headley* v.

Readhead, Coop. 50, where, however, no reasons are given by Sir *William Grant* for his decision. It is quite clear that the pecuniary legatee's right to marshal will prevail against the heir in the case of real estate descended; *Sproule* v. *Prior*, 8 Sim. 189; and also that he will be entitled to stand in the place of a mortgagee as against the devisee of the mortgaged estate: *Wythe* v. *Henniker*, 2 M. & K. 635. "The Court," says Sir *J. Wigram*, "compels the creditor to take payment of his debt out of his security or places the legatees in the same situation as if he had done so, not because the security is specifically bequeathed, but in spite of that circumstance:" *Johnson* v. *Child*, 4 Hare, 87, 95.

With respect to the principle of the rule under which a creditor or legatee might assert in his own favour the lien of the unpaid vendor, it will be desirable to ascertain what is the extent and value of the lien itself, how it is acquired, and by what means it is lost. The lien itself, then, is derived by a presumption of law that until the consideration, for which the estate is agreed to be transferred from the vendor, is actually paid, he retains a dominion over, or interest in, the estate, equivalent to the amount of the purchase-money remaining unpaid; in short, the credit which is given may be said to rest upon the confidence of the existence of such a lien, and is given for the purpose of supporting the truth and justice of the case; but this presumption, like many others in law, is capable of being rebutted:—thus, if the vendor is shown to have abandoned his lien by the acceptance of a substituted security, he will not be permitted to avail himself of both, to the prejudice of third parties; for, if the security be distinct and independent — as, for instance, a mortgage on another estate, or some other distinct security—it then becomes a substitution for the lien and can no longer be construed as a credit given because of the lien: *Bond* v. *Kent*, 2 Vern. 281; *Fawell* v. *Heelis*, Ambl. 724; *Nairne* v. *Prowse*, 6 Ves. 752; *Mackreth* v. *Symmons*, 15 Ves. 329; *Clarke* v. *Royle*, 3 Sim. 499; *Parrott* v. *Sweetland*, 3 Myl. & K. 655; *Buckland* v. *Pocknell*, 13 Sim. 406: but, where a bond or promissory note is taken by the vendor, he does not thereby relinquish his lien; *Tardiff* v. *Scrughan*, cited 1 Bro. C. C. 423; for the acceptance of such securities is regarded only as a mode of payment, and not as an independent security: *Hughes* v. *Kearney*, 1 Sch. & Lef. 132; *Grant* v. *Mills*, 2 Ves. & B. 306; *Winter* v. *Lord Anson*, 3 Russ. 488; *Teed* v. *Carruthers*, 2 Y. & C. C. C. 31; and *Matthews* v. *Bowler*, 6 Hare, 110.

WITHRINGTON *v.* BANKS AND COSTESWORTH.

June 29, 1725.

[MR. BARON PRICE, IN THE ABSENCE OF THE CHANCELLOR.]

Mortgagee restrained from cutting of timber, unless his security be defective; but what is cut down to sink the debt.

LORD WITHRINGTON, a papist, married the daughter of Sir Francis ————, who brought him a real estate; by her he had issue the plaintiff, whereby the lord became entitled to be tenant by the curtesy; after, in the year 1712, a fine was levied and mortgage made and settled in trustees, that they on payment of the mortgage-money should reconvey to Lord Withrington an estate for life, without impeachment of waste. Lord Withrington is attainted of treason, and his estate vested in commis-
[* 31] sioners for the * benefit of the public. Mr. Withrington puts in his claim to the reversion, free and discharged of committal of waste, which claim was allowed by the commissioners; who conveyed to the defendants all Lord Withrington's estate, with all privileges to the estate belonging.

The defendants also buy in the mortgage, and cut down a considerable value of timber off the estate, on which the bill is brought to restrain the cutting down any more timber; and that the money arising from the sale of the timber so cut down should be for the benefit of the heir.

For the plaintiff, the heir at law, it was argued, that by the constant rule of the Court, tenant for life is, out of the annual profits of the estate, to keep down the interest

affecting it, as the income of the estate is so much higher y the debt not being paid off; for if the debt were to be id off, the tenant for life would be obliged to pay a proportion of the debt, which is now settled to be one third, and the reversioner the other two thirds.

The mortgagee in fee, after forfeiture, may cut down timber at law, as the legal estate is in him; but not in this Court, unless it be a scanty security; in which case this Court will not restrain a just creditor from his legal privileges; but if it be an ample security, will restrain the cutting of timber; for as the mortgagee is only a trustee for the mortgagor, the timber when cut down must be applied to ease the estate, and not for his own benefit. But to have the debt diminished by the sale of timber, (which solely belongs to the reversioner,) would be to make his particular estate discharge a debt to which the tenant for life was in proportion liable. Suppose the value of the timber cut down was equal to the debt on the estate, and to be applied to the discharge of it; in that case the tenant for life would be no more charged with the payment of the interest of the money, which the law bound him to, and the reversioner would have paid the whole debt, when the law only charged him with a part; and this by the single act of the mortgagor, who by this means would rescind the settled rules of property, on that head, established with great justice and equality in this Court; the tenant for life and the mortgagee here being one and the same; this is a piece of artifice to diminish the charge on the tenant for life, and throw it on the reversioner.

Mr. Baron Price.—Mortgagee in fee, at law, may commit waste, but never in equity; unless it appears the security is defective, *which is not here; all conveyed by the commissioners of forfeited estates is tenancy by the curtesy, for have decreed that the reversioner shall have it free from committal of waste. Lord Withrington, being a papist, could take no larger an estate under the fine than he had before; that he might take as large has been determined. [* 32]

Vide *Hill* v. *Filkin*, ante, 22.

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what is cut down, and that applied in the first place to the payment of the interest, and then to the sinking of the mortgage; and injunction to stay any more felling.

The rights of a mortgagee, though absolute at law, are controlled in equity within the spirit of the transaction. Security for the amount advanced being all that the parties to the mortgage have in contemplation, the commission by either of any act which would tend to deteriorate the estate will be restrained in equity, at the instance of the other;—at the instance of the mortgagor, unless it appears the security is defective, (for which position *Withrington* v. *Banks* is the authority;) and at the instance of the mortgagee, if the security is, in the estimation of the Court, considered to be substantially impaired in value: *Farrant* v. *Lovel*, 3 Atk. 723; *Hippesley* v. *Spencer*, 5 Mad. 422; *King* v. *Smith*, 2 Hare, 239. These were cases in which the mortgagor was restrained from felling timber; it is not, however, waste to cut underwood at seasonable times and of proper growth, nor will the mortgagor in general be restrained from cutting underwood, although he be insolvent: *Humphreys* v. *Harrison*, 1 J. & W. 581: where, however, the application for the injunction was made in the interval between the bankruptcy and the choice of assignees, when there was no one to exercise a control over the property, an injunction extending to underwood was granted: *Hampton* v. *Hodges*, 8 Ves. 105.

SAVILE *v.* SAVILE.

July 1, 1725.

[MR. JUSTICE TRACY, IN THE ABSENCE OF THE LORD CHANCELLOR.]

Where two provisions are made, and the second sum is less than the first, shall not be looked on as a satisfaction, but to have both.

A MARRIAGE settlement was made of lands, which are covenanted to be worth 4000*l.* per annum, and a covenant to purchase other lands of the value of 1000*l.* per annum; a term of one hundred years is limited to trustees, in trust that if shall happen shall have issue daughters, and should happen to die, not having issue male who should live to twenty-one, or happen to die before twenty-one, leaving no issue male, then out of such profits, issues, rents or sale, to raise the sum of 16,000*l.*; if shall be but one daughter, as aforesaid, who lives to twenty-one or marriage, to have the whole 16,000*l.*; if should have more daughters, they to have a proportionable part of the 16,000*l.* In the settlement there was also a clause to enable him to charge the 1000*l.* per annum, (to be purchased,) by any deed or will, with any sum or sums of money for any children.

He had a son and a daughter, and by his will charges the 1000*l.* per annum, with 3000*l.* for her, and also with 5000*l.* if she did not receive so much out of the Bank's estate; (something having been left her by one of that name.)

The son dies before the age of twenty-one, without issue male; the daughter brings her bill for the 16,000*l.* by the settlement, as also the provision by the will.

It was insisted, she should not be entitled to the 16,000*l.*, and also the 8000*l.*, for the enabling clause in the settle-

ment, to charge the 1000*l.* a year for *any* children, must necessarily be restrained to younger children, though the expression be general; else this absurdity would follow; supposing he had only a son, it would be giving him a power to give the son money out of his own estate, so must be meant younger children, and then it will stand thus; if 8000*l.* be settled for younger children, and if no elder son, 16,000*l.*, if she comes of *age in the life of her brother, will have 8000*l.*, but if her brother dies after, will not be entitled to both, for is entitled to a different provision, viz. 16,000*l.*, and nothing is more certain, than that a person shall not have two portions or provisions; and so was the case of *Thomas* and *Kemis;* two different sums were to be raised out of different lands, and at different times, and also different maintenances; yet decreed only one should be raised, which was affirmed by the Lords. So the case of *Copley* v. *Copley*, before Lord *Harcourt.*

[* 33]

On the other side it was said, they made no dispute that a double provision should never be, where only one was intended; but this was not a double provision, but only one provision under the same settlement, part of which was certain, the other contingent, and both designed. It was certainly in his power to have charged the 1000*l.* per annum, with any sum for children; and 16,000*l.* was charged for daughters, pursuant to settlement; and if he had a power, and the words are of sufficient extent to do it, shall not by any forced construction be restrained.

The 8000*l.* is certain, the 16,000*l.* is on a contingency, which happened after the 8000*l.* was to be received. And it is very observable, that in the case of double portions, there is no instance where the second provision is less than the first, that ever it has been held a satisfaction; for a partial satisfaction has never been admitted, as appears by the common case; if a man owes a sum of money, and gives the same person a less sum of money by will; that neither goes in satisfaction or diminution, but will have both.

TRACY, J.—If there had been no children but daughters, and he had exercised his power over the 1000*l.* per annum, that never could be as part of the 16,000*l.*: in all the cases

cited the second sum is more or at least equal to the first provision. So decreed both sums to be raised, and that the 16,000*l.* should be raised with interest and costs from the death of the brother.

She was above the age of twenty-one; it was formerly referred to a Master, to see what she had received out of Bank's estate.

It may be collected from the succeeding authorities that the rule, as asserted in the case of *Savile* v. *Savile*, cannot at the present day be supported to the full extent in which it is there laid down; viz., "that where, in the cases of double portions, the second sum is less than the first, it shall not be looked on as a satisfaction, but that the legatee shall have both." The rule, as applicable to the construction of double portions and advancements, has certainly been far from uniform. Generally, however, it may be stated, that where a parent has by articles or settlement, covenanted to provide portions for his children at his death, and subsequently provides to the same extent for such children by his will, the provision by will shall be presumed to be a satisfaction of the covenant; *Copley* v. *Copley*, 1 P. Wms. 147; and, where a parent shall have provided for a child by his will, and subsequently shall have advanced such child, the presumption is that the legacy is thereby adeemed: *Ward* v. *Lant*, Prec. Ch. 182: where a testator bequeathed 5000*l.* apiece to each of his four daughters as their portions, to be raised out of his real estates, and he afterwards advanced 4000*l.* to one of them upon her marriage, it was held that the smaller sum was an ademption of the legacy. The authority however of this last case, so far as it goes to establish the proposition, that the advancement of a smaller sum shall adeem and satisfy the larger amount by legacy, has been with reason long impugned, and it has finally been overruled by Lord *Cottenham*, in the case of *Pym* v. *Lockyer*, 5 Myl. & Cr. 55, where he observes, that "the result of a careful examination of the authorities is, that there is not sufficient authority to support the supposed rule, but that, on the contrary, the weight of authority is decidedly against it; and as it cannot be supported upon principle, and is, in its operation, generally destructive of the interests which parents have intended for their children, he thought it his duty, notwithstanding the manner in which it had been received in the profession, to decline adopting or following it, and therefore to de-

clare that the advancements, upon the respective marriages in that case, were to be taken as ademptions, pro tanto only, of the legacies before given." See also *Earl of Durham* v. *Wharton*, 3 Cl. & Fin. 146; *Kirk* v. *Eddowes*, 3 Hare, 509.

It was at one time conceived that the question of advancement could not be entertained, unless the advance emanated from the parent himself, or at least from one who, the parent being dead, had placed himself in loco parentis: *Powys* v. *Mansfield*, 6 Sim. 528: but in this particular the judgment of the Vice Chancellor of England was reversed; *S. C.* 3 Myl. & Cr. 359, where an uncle was considered as standing in such relation: see also *Currant* v. *Jago*, 1 Coll. 261. The same presumption does not arise in the case of a natural child: *Ex parte Pye*, 18 Ves. 140: though even in such a case it may be inferred from circumstances; as, where a testator had bound himself to a parish for the support of his illegitimate child, and had made weekly payments in pursuance of this obligation until his death, it was held that he had placed himself in loco parentis, and that his assets were accordingly answerable: *Rogers* v. *Soutten*, 2 Keen, 598.

With respect to the admissibility of evidence to explain the intention, it may be laid down as a general rule that no evidence will be admitted to prove with what intention the will was made; *Hurst* v. *Beach*, 5 Madd. 351; *Guy* v. *Sharp*, 1 Myl. & K. 589; and see also the observations of *Sugden*, L. C., in *Hall* v. *Hill*, 1 Dr. & War. 94; though evidence will be admitted to explain or affect the transaction by which the provision in the will is presumed to have been satisfied; see *Plunkett* v. *Lewis*, 3 Hare, 316.

Personal property under an intestacy is clearly not a satisfaction of a portion; *Twisden* v. *Twisden*, 9 Ves. 413; for, as observed by Sir *Thomas Plumer* in the case of *Goldsmid* v. *Goldsmid*, 1 Swanst. 219, "satisfaction supposes intention; it is something different from the subject of the contract, and substituted for it; and the question always arises, Was the thing done intended as a substitute for the thing covenanted? a question entirely of intent: but, with reference to performance, the question is, Has that identical act which the party contracted to do been done?" Keeping in view the distinction between performance and satisfaction, the latter, being always a question of intention, can only be raised on cases which arise under wills; for it is impossible to predicate an intention where there is an intestacy. Slight differences, per se, will not be sufficient to rebut the presumption; *Weall* v. *Rice*, 2 R. & M. 251; but it has been held sufficient to rebut such presumption that the legacy is contingent; *Bellasis* v. *Uthwatt*, 1 Atk. 426; or, that the legacy is given diverso intuitu, as in *Foster* v. *Evans*, 6 Sim. 15. In the case of *Hales* v. *Darell*, 3 Beav. 324, annuities of 300*l.*

which had been granted by a testator in his lifetime to his two sisters, for valuable considerations, were held not satisfied by testamentary bequests of annuities of 900*l.*; but there there was intrinsic evidence on the face of the will that the obligations of the testator were not to be swamped by his bounties; for the will recognised the annuities as secondary charges on the lands, and in one instance specified his intentions as to satisfaction, which affords fair presumption that had he intended the annuities by will to have satisfied those by deed, he would have declared his intention in plain terms.

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* WESTERN, EXECUTOR OF WESTERN, *v.* CARTWRIGHT, EXECUTOR OF CARTWRIGHT. [* 34]

[SAME DAY IN THE AFTERNOON, BEFORE LORD CHANCELLOR.]

Stated accounts after a great length of time not set aside against executor, though fraud.

JOHN MATHEW made his will in the year 1679, being possessed of several houses, and mortgaged interests, and seised in fee of three fourths of a wharf and sugar houses; and left his estate to be equally divided between his sons James, John, Olive, and his daughter Anne, (Olive died in the life of the father,) and made Mortimer and Cartwright his executors, and empowered them to improve the estate for his children, and gave them 20*l.* apiece for their trouble; and that they should account quarterly, and if so, 40*l.* per annum should be allowed them; the testator dies in 1680, and Cartwright took upon him the management of the estate in 1681. In 1692, Mathew Western, father of the plaintiff, applied to Mr. Cartwright to have leave to make his addresses to Mrs. Anne Mathew; and he had leave so to do, but obliged him to give bond, that he and his future wife should sign his accounts, and covenant not to ravel back into them: in 1693, the marriage was had,

and in pursuance of the bond signed the accounts; and since signed several accounts to which the bond did not extend, but have incurred since; James died in the year 1698, and left his fortune between his brother John and Anne his sister, of which Cartwright had the management; Mr. Cartwright soon after John came of age, and was out of his apprenticeship, told him his brother and sister had examined and signed his accounts, and desired him to do so too; on which he at once signed nine several accounts.

In Trin. Term, 1708, John Mathew brought his bill against the defendant's testator; to which bill Western the plaintiff's testator was made defendant; the bill charged among other concealments, that in the year 1687, he had made a lease of the wharf at an under rent, the benefit of which was to himself; and that, in the year 1695, all the wharfingers laid all the wharfs together under one common management, with liberty for all such as were concerned in interest to subscribe in; he subscribed in as tenant at will, not as belonging to the infants; on which a considerable profit was made; to have the benefit of which was the end of the bill.

To this bill Cartwright pleaded several stated accounts, and denied fraud.

[* 35] * Western, the plaintiff's testator, by his answer swore that he examined into the account, and that he had the books ten days before him, before he entered into the bond. In the year 1712 the cause came to be heard, and Lord *Harcourt* declared, that if any inconvenience should happen to Cartwright, by going into an open account, it was his own fault, being by the will to account quarterly; and that it appeared, that John was drawn in by his brother's signing, and that it was a notorious fraud and breach of trust; and decreed an open account, and to account for the profits of wharfage subscribed.

Lord *Macclesfield* was of the same opinion, 1718, and decreed payment of what was due on the foot of the account, with interest.

The present bill is brought to be let in on the foot of the account.

For the plaintiff, that he was a common trustee for them all; this is a plain consequence of the other case, for the same account cannot be deemed an honest and fair account as to one, and fraudulent as to another equally concerned in interest; it would be construing the same account fraudulent, and not fraudulent at the same time: in numberless instances, the very obliging to give bond has of itself been sufficient to open the account. And no weight can be laid on the plaintiff's father not having desired to open it; for he supposed the account just and fair, and now he has found otherwise; neither will his having looked over the account be any argument; for all that could appear there would be faults in the calculation, or miscasting; by looking over that could not discover omissions, or fraudulent transactions; and where there is fraud, no length of time can bar; as was resolved in the case of *Lord Warrington* v. *Booth*, in the House of Lords.

Lord Warrington v. *Booth.*

To which it was answered, that the present case is by no means like that of Mathew's bill, for there he was a young man just come of age, and drawn in to sign the accounts which he had never examined, therefore were very properly opened; but here there was a man of full age, who on mature consideration, and examination of them, signed them, and signed several others on the same foot after; of the justness of which he was so well satisfied, that he never attempted to impeach them; and it would be highly unreasonable to go to do it now against his executor, at this great length of time, who may be perfectly ignorant of all the transactions; it is certainly true, that no time will bar, *where there is fraud; but that must be understood where the fraud is concealed; for if it be known, (as the whole affair was here,) it certainly may. [* 36]

As to the lease being made in trust for himself, it was made for the whole body of wharfingers, who had thereby an equal benefit with him; and the profit thereby was not supposed to be very considerable, as he parted with one of the shares without a præmium.

Lord Chancellor.—There is a great deal of difference, where a trustee makes a lease for himself in trust, or

where he happens to be concerned with a great many others, and a lease is let to one for the benefit of them all: as this is opened I see no fraud; this was a project for the common benefit of wharfingers, and it has happened to succeed; without some such expedient the rent must have sunk; and is it not reasonable, that the person who run the hazard should have the benefit? Here are several stated accounts by men of perfect ages and understandings, and a great length of time hath passed; to have a bill brought now against the executors of a man who is gone out of the world, would be very wrong: this Court has gone great lengths in relieving against the Statute of Limitations, and run into all the inconveniences designed to be avoided by the legislature. Here it appears Western knew of the wharfingers' affair.

Pen I remember signed several stated accounts, and brought a bill to open them as fraudulent, but the Court would not relieve.

It is much better for the public that one man should suffer than all the world be in uncertainty; people should come in a reasonable time. I do not say accounts are conclusive; but it would be very hard to put a man's executors, who knew nothing of the matter, to answer.

And if it be a fraud, and he knows of it, I do not see but may be barred as soon as another.

Courts of equity exercise concurrent jurisdiction with Courts of law in matters of account; where an account is impeached in the former there are two modes of redress; one by a decree opening the whole accounts generally, the other by a decree to surcharge and falsify. In the case of *Vernon* v. *Vawdry*, 2 Atk. 119, it is said, "If there are only mistakes and omissions in a stated account, the party objecting shall be allowed no more than to surcharge and falsify. But if it appears to the Court that there has been fraud and imposition, the decree must be that the whole shall be opened, notwithstanding (in that case) it was a stated account of twenty-three years' standing, and the party guilty of the fraud was dead." Such is the rule at this day: *Allfrey* v. *Allfrey*, 1 Mac. & Gor. 87. The case of *Western* v.

Cartwright cannot therefore be regarded as an authority for the proposition, that length of time will have any operation in preventing the opening of accounts where fraud is shown to have existed. The only other case which agrees with *Western* v. *Cartwright* is that of *Brownell* v. *Brownell*, 2 Bro. C. C. 62; but Lord *Cottenham*, in the case of *Allfrey* v. *Allfrey*, 1 Mac. & Gor. 87, has entirely dissented from the judgment in *Brownell* v. *Brownell*, observing, that "it would be vain to tell the injured party 'If you can point out an error it shall be corrected;' for that is exactly the difficulty under which he labours." Ib. 95.

Primâ facie, it is a sufficient settlement of accounts in equity if they be in writing though not signed by the parties, provided it can be shown that the settlement was submitted to and acted upon by both parties: *Willis* v. *Jernegan*, 2 Atk. 252. To constitute a ground for opening a settled account, there must be proof of some palpable fraud. Of course, when the relation of trustee and cestui que trust has existed, there lies no presumption from an acquiescence on the part of the cestui que trust; nor will any admission by him, founded upon the statements of the trustee, preclude him from taking the account from the commencement of the trust: *Wedderburn* v. *Wedderburn*, Myl. & Cr. 41: and more especially if the settlement was come to by the parties soon after the cestui que trust had attained his majority: Ib. Where errors only are alleged, as in the case of *Scott* v. *Milne*, 5 Beav. 215, Lord *Langdale* refused to open accounts which had been rendered in 1812, though the accounting party stood in the relation of a trustee: and, more recently, Sir *James Wigram*, where accounts had been settled upwards of twenty years, refused to open them at the instance of residuary legatees desiring inquiries for the purpose of raising implied trusts, and imputing fraud to executors in the management of the trusts reposed in them, on the ground that a Court of equity will not enter upon inquiries for the purpose of raising an implied trust, though aliter as to express trusts: *Portlock* v. *Gardner*, 1 Hare, 594; see also *Millar* v. *Craig*, 6 Beav. 433.

EDEN *v.* FOSTER.

(COMMONLY CALLED THE CASE OF BIRMINGHAM SCHOOL.)

July 3, 1725.

[LORD CHANCELLOR, LORD C. J. EYRE, AND LORD C. B. GILBERT.]

Governors are appointed of a charity, and lands given to them, *whether are not visitable.*

KING Edward the Sixth founded Birmingham School, and appointed twenty governors, and gave several lands to the governors; whom he appointed gubernatores possessionum et reddituum, and gave them a power of making statutes by the advice of the Bishop of Litchfield.

[* 37] * 28 Nov. 1723. Lord Chancellor *Macclesfield* granted a commission to inquire per sacramentum, juratores et testes, aut aliis viis aut modis, ad inquirendum, examinandum, faciendum et exequendum cum effectu; and that any four of the commissioners should have the power of making statutes.

Exceptions were taken, before Lord Chancellor *Macclesfield*, to the decree of the commissioners; which being overruled, the legality of the commission was now solely in question. For which purpose two points were insisted on.

1. That no commission could go; and if there could,

2. That the present commission was improper and illegal.

This must be founded on the 29 Eliz. c. 6, or 43 Eliz. c. 4, or on the common law. It is not founded on either of those; as this proceeds in a different manner than directed by either of those acts, so does not derive under them.

If not, it must depend on the king's visitatorial power by common law. The king has certainly a visitatorial power of royal foundations, by being founder, either by his charter, or by commission, if he has not parted with it.

It must be admitted, that there are no express words by which he appoints a visitor, but there is an implied appointment of a visitor, as he has appointed governors, who are in the eye of the law visitors: so that by making governors, he has parted with his visitatorial power, which would have existed in him, if he had not appointed governors. That the appointment of governors is the appointment of visitors appears from 10 Coke, *Sutton's Hospital's case*, it is so expressly said; so Rolle's Abridgment, "If a lay hospital be erected, and no visitor appointed, and there are governors appointed, those governors are visitors;" and this is to be considered as Rolle's opinion, who else would have put a quære to it, as he does in cases where he is not satisfied; and to this observation C. B. *Gilbert* agreed.

10 Coke, 1.

2 Rol. Ab. 231.

It has been a dispute, that if the governors misapply, whether a commission may not go; and so in 1616, in Duke, the case of *Sutton Coldfield;* but in Duke, in the case of *Chelmsford*, 1649, there being governors who misapplied, a commission sent to examine was set aside, and a bill ordered to be brought on the foot of a trust.

Duke, 68.

Duke, 84.

If a governor be a visitor, then it is to be considered, if there be a visitor, whether a commission can go; and it is plain it cannot, because the Chancellor has only the power of a visitor, which is parted with by such a constitution of a visitor before. Co Litt. 96. So the Reg. 40 and 41, the king cannot visit because another person was visitor. But *supposing the power of granting a commission, whether well executed; this is a commission to inquire, which cannot be good. 12 Co. 91. The commission does say, if find anything amiss, may do as they think right; but this is not restrained to the laws of the kingdom, to which Magna Charta confines them; and though they should not act against law, they have a power so to do; and whether a power given to them, by which they may act contrary to law, consistent with that power, be a good power in its creation, can admit of little debate; the power given must be good or bad in itself, and not depend on the execution of it; which would be to make a present power depend on a future act: by the constitution, the governors

[* 38]

12 Co. 91.

are to make statutes with the approbation of the Bishop of Litchfield; by this commission, any four may make statutes without his approbation, or agreeable to the statutes so made, which are to be inviolably observed.

On the other side it was said, this commission is not founded on any act of parliament, nor could it have been; for in 43 Eliz. there is a particular exception of Ed. VI. foundations; but this is maintainable by the common law; for wherever the crown, or other person, founds a college, there by the very foundation there is an inspection; and the power of the king depending on the foundation is the same, and no other than that of a common person, though the king may exercise it by his chancellor, or by commission. What they allege is, that particular visitors are appointed, and rely on the clause constituting governors, but without any visiting words, and cite Coke, *Sutton's Hospital's case:* but it is very observable, there was a private act of parliament, and next a charter, with a power of visiting, with negative words, that none else should; so that what Coke says, that the poor not being incorporated, and the governors being so, that they should have a visiting power is merely explanatory; and that not being the case in hand, is an extrajudicial opinion.

Where a general corporation is founded, as a town erected into a corporation, that concerning the public is under the general law.

4 Mod. 124. But where a private corporation, as a college, that is under those particular laws the founder establishes (if not against the law of the land); this distinction is laid down

Ray. 106. in Raymond, 106; and a college is within the same rea-

Reg. 40. son as an hospital. Reg. 40 is against visiting an hospital

F. N. B. 42. of the king's foundation. In F. N. B. 42, the word is

[* 39] omnia; and as *Coke's extrajudicial opinion is contrary to these, little regard should be had to it; and without relying on authority, from the nature of things, the design of visiting is solely to prevent a misapplication of the revenues; and to have the persons, who are to be visited, visit themselves, would be absurd and vain, and would be the same as to say, should not be visited at all.

If a private person founds, and appoints trustees, yet he may visit; and the reason is very strong, for else might destroy those charities he had created. But if there are negative words, and he declares he will not visit, no visitatorial power remains; but those words must be very plain to show his intent; because the nature of the thing is so strongly against it, that the persons, in whose hands the money is, and whose interest it is to misapply it, would be unaccountable and irresponsible; so that the words should be very plain to show so unreasonable an intention; if they are so, no more is to be said, but stet pro ratione voluntas.

Besides, to construe those governors to be visitors, would be contrary to the fundamental rules of law, that the king's grant should not be taken to a double intent; for they may be governors without being visitors.

It does not at all follow, because from part of the body being incorporated, that they are not visitable; great part of both universities are no part of the corporation, nor vested with any possessions; the fellows yet have a governing power as to their dress, &c., which is a visitatorial power, yet they themselves are to be visited; they may visit those under them, but that will not exempt themselves from being visited.

The governors are the only persons capable of misapplication, so the greatest reason in the world they should be visited.

The power given the governors is a restrained power, it is to be with Bishop of Litchfield's consent; and as they, by law, of themselves might have made laws, this is a restraint on the general power the law gave them.

Where persons are appointed governors, and have a bare authority, under that denomination may be visitors; but where an interest is given them, and they have the estate, they are only as trustees for the founder, and liable to be visited.

2. As to form of the commission.

No particular form is required; any that is not contrary to law is good; and as to saying this is a general power, *and not restrained to act secundum legem terræ, so that [* 40]

under it might act illegally; but where a general power is given, it is ever to be understood as circumscribed by the law of the land; for it can never be intended to be an authority to act illegally. At common law to admit such a commission, would be wrong; but this is a private foundation; here the words are the same as in the commissions of oyer and terminer.

Though by the charter particular persons are to make statutes, as there are no negative words, the king may give them statutes when he thinks proper.

The power of the founder is as much lex terræ, by Magna Charta, as trials by juries are.

Such sort of commissions have frequently gone where the governors were incorporated, as here.

Winburn School.	6 April, 12 Car. I.
Plymont School.	12 Car. I.
Bethlem.	19 Car. I.

The Court gave no judgment then; but said it would be an odd construction, that where lands were given to the governors, to suppose a visiting power was designed them, that is, that they should be checks on themselves in respect of the lands; though they may have a visiting power, as to the school, by being governors.

Order to be attended with precedents, and to give judgment next term. At which time, as I was informed, the commission was held good, and that the governors were to be visited.

In this case, as reported 2 P. Wms. 325, the Lord Chancellor *King* was assisted by *Eyre*, C. J., and *Gilbert*, C. B.; and the following six points which they laid down will best illustrate the law, as it now stands, with respect to the rights and incidents of governorship, and visitation of eleemosynary corporations. — 1st, Where the king is founder; in that case his majesty and his successors are visitors: but where a private person is founder, there such private person and his heirs are by implication of law visitors.—2ndly, That though this visitatorial power did result to the founder and his heirs, yet the founder might vest or substitute such visitatorial right in any other person, or

his heirs.—3rdly. They conceived it to be unreasonable and of mischievous consequence, that where governors are appointed, these by construction of law and without any more should be visitors, should have an absolute power and remain exempt from being visited themselves. And therefore, 4thly, That in those cases, where the governors or visitors are said not to be accountable, it must be intended where such governors have the power of government only, and not where they have the legal estate and are intrusted with the receipt of the rents and profits (as in the present case); for it would be of the most pernicious consequence imaginable, that any person intrusted with the receipt of rents and profits, and especially for a charity, though they misemploy never so much these rents and profits, should yet be unaccountable for their receipts; this would be such a privilege as might of itself be a temptation to a breach of trust.—5thly, That the word (governor) did not of itself imply visitor; and to make such a construction of the word against the common and natural meaning of it, and when such a strained construction could not be for the benefit but rather to the great prejudice of the charity, would be very unreasonable; besides, it would be making the king's charter operate to a double intent, which ought not to be.—6thly, Whereas it had been objected, that the commissioners by this commission had a power given them to make by-laws, by virtue whereof such by-laws might be made as would destroy even the directions of the original founder and the very end of the charity.

In accordance with the fourth resolution above cited, it was decided that, where no visitor is expressly appointed and where the legal estate of the endowment is vested in the governors, the latter as to the management of the revenues are subject to the jurisdiction of the Court of Chancery: *Ex parte Kirkby Ravensworth Hospital*, 15 Ves. 314: and where a special visitor has been appointed the Court of Chancery will not interfere with the internal regulations of the charity, when the visitor might reform the alleged abuses and does not refuse to do so: *The Attorney-General* v. *Dulwich College*, 4 Beav. 255. The general controlling power of the Court of Chancery over charities does not extend to a charity regulated by governors under a charter, unless they have the management of the revenues and abuse their trust: *Attorney-General* v. *The Governors of the Foundling Hospital*, 2 Ves. jun. 42. It is laid down by *Holt*, C. J., that patronage and visitation are necessary consequents one upon another; and that the visitatorial power is an appointment of the law, and as regards all eleemosynary corporations is inherently exercisable by the founder, and his heirs or assigns: *Philips* v. *Bury*, 1 Ld. Raym. 5.

Spiritual corporations are visited

in ecclesiastical matters by the ordinary: civil corporations are subject to the visitation of the king in his Court of King's Bench. Where there is an endowment, and no special visitor is appointed by the founder, or where his heirs are unknown or do not choose to act, it is provided by the Statute of Charitable Uses, 43 Eliz. c. 4, that they may be visited by commissioners appointed under the great seal: Bac. Abr. Corp. F.

PUGH *v.* RYAL.

July 5, 1725.

[LORD CHANCELLOR.]

Lease is made of lands belonging to a charity to the nephew of the clerk at a great under-value, he sells it to the clerk; the lease set aside as fraudulent, but under-leases made by him held good, and the rent to be paid to the charity.

THE trustees of the charity of St. Mary Overees in Southwark made a lease of nine houses to the nephew of their clerk, under the rent of 5*l.* per annum, for sixty-one years, in which was a covenant from the nephew to rebuild five of them. The nephew, in consideration of 100*l.*, which was proved to be paid, assigns over his interest to the clerk of the charity; who makes a lease of five of the houses for forty years, under the yearly rent of 5*l.* with covenant from the tenant to rebuild them, and also received a fine of 20*l.*, so that he had four of the houses for nothing immediately, and a reversion for twenty-one years of the other five houses, after the expiration of the lease he had made.

[* 41] *The Court looked on the payment of the 100*l.* only as a colourable transaction between the clerk and the nephew, considering the nearness of the relation between them; and considered it as an imposition by the clerk on the trustees; so set aside the lease; for the clerk is supposed

to know the true value of the estate, every thing being under his management. But the lease made to the under-tenant to continue, and the rent to be paid to the trustees.

It appeared the clerk had rebuilt one of the four remaining houses; so the Court by consent set the 20*l.* he had received, and the profits he had made, against his expenses; else would have ordered an account of his receipts and expenses, and the estate to stand a security for what he had laid out.

Courts of equity watch with the utmost jealousy all dealings with the property of charities. Wherever there is an alienation (beyond the usual term) of charitable property, it is incumbent upon the party seeking the benefit of the alienation to show not only that the transaction was not fraudulent, but that it was beneficial for the charity: *The Attorney-General* v. *Kerr*, 2 Beav. 420; *The Attorney-General* v. *Brettingham*, 3 Beav. 91: and see, as to husbandry leases, *The Attorney-General* v. *Pargeter*, 6 Beav. 150; and as to building lease, *The Attorney-General* v. *Foord*, 6 Beav. 288; *The Attorney-General* v. *The Corporation of Cashel*, 3 Dr. & War. 294; *The Attorney-General* v. *The Corporation of Plymouth*, 9 Beav. 67; *The Attorney-General* v. *The Mayor, &c., of Newark-upon-Trent*, 1 Hare, 395. "The principle," says Sir *T. Plumer*, "that governs all the cases is this, that trustees are bound to a provident administration of the fund for the benefit of the charity. There is no positive law which says, that in no instance shall there be an absolute alienation. If so, even in the case of an inquiry under an order of the Court, whether alienation would be beneficial to the charity, being contrary to law it could not be good; but on many occasions, by the authority of the Court, alienation has taken place; as in the case mentioned of a decayed house, in which, after a reference to the Master to inquire, whether it was for the interest of the charity, the Court directed it to be disposed of. If contrary to law the Court could not authorize the disposition; alienation, under the authority of the Court, would be as invalid as without it. These decisions, therefore, afford a conclusive proof, that alienation, not improvident, but beneficial to the charity, and conformable to the rule which ought to guide the trustees, may be good; and disclose the principle on which any bill to rescind that alienation must pro-

ceed :" *The Attorney-General* v. *Warren*, 2 Swanst. 302; and see *The Attorney-General* v. *Buller*, Jac. 412.

Where third parties are affected with notice of the relation in which a trustee stands, they never can in a Court of equity assume any other character than that of trustees: *Wilson* v. *Moore*, 1 Myl. & K. 147; *Turner* v. *Trelawny*, 12 Sim. 49; *The Attorney-General* v. *Pargeter*, 6 Beav. 150: and see *Whitackre* v. *Whitackre*, ante, p. 13.

STEPHENS *v.* CRAVEN.

Depositions of a person who was a defendant, and struck out, and examined, whether to be read.

THE depositions of a person who was made a defendant, and struck out, and examined as a witness, were offered to be read; and the case of *Coke* v. *Gaugh* was cited, where it was so done.

CHANCELLOR.—I will not do it till I see that case. I have no great reverence for the rule, but if it be a rule, I must pursue it.

There are two requisites to the admissibility of evidence under such circumstances: first, that the defendant, who has been examined as a witness, shall have been dismissed the record with costs; *Weymouth* v. *Boyer*, 1 Ves. jun. 416; *Hills* v. *Nash*, 10 Beav. 308; and secondly, that the individual against whom it is proposed to read such evidence has had an opportunity of cross-examining the witness: *Coke* v. *Fountain*, 1 Vern. 413. Where evidence is to affect parties standing in the shoes of others, the Court will not on motion make an order that it be read, dispensing with the legal proof per saltum; but will direct it to be proved in due form: *Goodenough* v. *Alway*, 2 Sim. & St. 481.

An order to examine a co-defendant, saving just exceptions, is of course, and may be obtained after, as well as before the decree: *Paris* v. *Hughes*, 1 Keen, 1; *Van* v. *Corpe*, 3 Myl. & K. 269; and the objection as to the competency of such testimony cannot be raised by motion, but is open to the plaintiff when the evidence is tendered: *Steed* v. *Oliver*, 5 Hare, 113.

By the 1st section of 6 & 7

Vict. c. 85, it is provided, that in Courts of equity, any defendant to any cause pending in any such Court may be examined as a witness on the behalf of the plaintiff, or of any co-defendant in any such cause: saving just exceptions; and that any interest which such defendant so to be examined may have in the matters, or any of the matters in question in the cause, shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness.

Under this statute, it has been held, that it was not a valid exception to the testimony of one of two defendants that both defendants had exactly the same interest, the title of both depending on the same issue: *Wood* v. *Rowcliffe*, 6 Hare, 183; sed vide *Monday* v. *Guyer*, 1 De G. & S. 182. Lord *Cottenham*, in the recent case of *Clarke* v. *Wyburn*, 12 Jur. 613, expressed his opinion, that where there were several defendants, and one alone had a substantial interest in defeating the claim of the plaintiff, the evidence of the defendant so interested was not rendered admissible by the statute.

It is an absolute rule of practice, and which remains unaffected by the statute, that a plaintiff on the record cannot be examined as a witness in the cause: *Fisher* v. *Fisher*, 2 Phill. 236.

CRULL *v.* DODSON.

July 8, 1725.

[LORD CHANCELLOR.—REHEARING ON THE PETITION OF THE DEFENDANT.]

Bargains relating to stock are within the Statute of Frauds; and, if earnest not given, are nuda pacta.

THE defendant was a broker, and had 5000*l.* South Sea Stock of the plaintiff's in his hands, who told him he would sell when stock came to 200*l.* The defendant, when the stock was risen beyond that price, told him he had sold 1000*l.* of it to one at 200*l.* per cent. and 500*l.* to another, who was his partner, and the rest he had taken himself at that price; and entries were made in his books accordingly, but in such a manner, that it looked as if done after the

rise of stock, and only designed as an evidence, in case of a dispute. The plaintiff insisted, that at the time of the pretended sale stock was at 300*l.*, and insists on that price. The affair was left to arbitrators, and 4000*l.* deposited as a security for so much as should be due: the arbitrators did nothing; so a decree was for the 4000*l.* against which the defendant petitions.

[* 42] * The Court was of opinion it was a fraudulent transaction; and that on the sale, if such there was, he should have taken earnest; for it has been determined here, that such a bargain is within the Statute of Frauds, and without earnest, only nudum pactum. The decree should have been to account for the 5000*l.* and the produce of it; but as the plaintiff acquiesces under the decree, and it is reheard on the petition of the defendant, can do no more than affirm the decree.

The better opinion seems to be, that corporeal and tangible things only are the subjects of contract within the 17th section of the Statute of Frauds, 29 Car. II. c. 3; see *Pickering* v. *Appleby*, Com. Rep. 354; and that therefore stock in the public funds is not within the statute, though not yet decided: see 4 Bing. N. C. 445, as to stock. It has been distinctly held that shares in a railway company are not within the provisions of the 17th section: *Bradley* v. *Holdsworth*, 3 M. & W. 422; *Duncuft* v. *Albrecht*, 12 Sim. 198. Independently however of this consideration, the case could not have been decided on any other grounds than that of public policy; see 5 Vin. Ab. 508; for if the parties were capable of contracting, the broker's entry would have been sufficient to evidence the contract: *Hinde* v. *Whitehouse*, 7 East, 558; *Heyman* v. *Neale*, 2 Camp. 337. On the grounds of public policy, then, it may be laid down as a certain rule, that no transaction involving a purchase by a broker on his own account from his principal can be sustained.

The fiduciary office of broker eminently places him in a position where his interest conflicts with his duty; see *Whitackre* v. *Whitackre*, ante, p. 13; and, for this reason, neither lapse of time nor the showing that the full market price was given will avail to uphold a transaction between a broker and his principal, where the broker is either the

buyer or seller; *Brookman* v. *Rothschild*, 3 Sim. 153; affirmed, 5 Bli. N. S. 165. "Where a man employs another as his agent," says Lord *Langdale*, "it is on the faith that he will act in the matter purely and disinterestedly for the benefit of his employer, and assuredly not with the notion that the person whose assistance is required as agent has himself in the very transaction an interest directly opposed to that of his principal. It frequently happens that the same person is agent for both parties, in which case he holds an even hand, and acts in one sense as arbitrator between them; but if a person employed as agent, on account of his skill and knowledge, is to have in the very same transaction an interest directly opposite to that of his employer, it is evident that the relation between the parties then becomes of such a nature as must inevitably lead to continued disappointment, if not to the continued practice of fraud:" *Gillett* v. *Peppercorne*, 3 Beav. 84; see also the recent case of *Wilson* v. *Short*, 6 Hare, 366.

RAWSON *v.* TURNER.

July 9.

[LORD CHANCELLOR.]

Any person interested may except to a decree made by commissioners of charitable uses, though refused to appear before them.

RAWSON was summoned to appear before the commissioners, but never appeared; and now he takes exception to the decree of the commissioners.

CHANCELLOR.—The Act says, any person concerned in interest may except.

The decree of the commissioners is returned into the petty-bag office, and then the defendant is served with a writ of execution, upon which he may file exceptions and pray to stay proceedings till they are heard; 2 Bac. Abr. 58; and when returned by the effect of the 9th section of the 43 Eliz. c. 4, it comes as it were in the shape of a cause in which the

exceptants are considered as plaintiffs and the respondents as defendants: *The Bailiff, &c. of Burford* v. *Lenthall*, 2 Atk. 551. On a similar principle, a stranger to a suit in equity is allowed to intervene where he has a paramount right to the estate, or where the property of a defendant has been taken under a sequestration; and an examination "pro interesse suo" will be directed, to ascertain the validity of the claim: *Lord Pelham* v. *Duchess of Newcastle*, 3 Swanst. 290.

APPLEYARD *v.* WOOD.

July 12, 1725.

[LORD CHANCELLOR.]

A will of a copyhold does not require three witnesses; but whether a trust relating to copyhold declared by will does, qu.

A SURRENDER was made of a copyhold estate to trustees, to the use of the will; a will was made with only two witnesses to it.

It was admitted, that a will of a copyhold estate does not require three witnesses; but this is a devise of a trust relating to lands, so within the very words of the Statute of Frauds, the heir controverting the surrender and the will: this point was not determined, but two issues ordered.

Though the Chancellor seemed to be of opinion, that the devise of a trust must ensue the nature of the estate, and not make it be necessary to have three witnesses, as the copyhold might be devised without three witnesses; this may be a question to be determined when the issues are tried.

The point which was raised in this case was decided a few years afterwards in favour of the validity of the devise: see *Tuffnell* v. *Page*, 2

Atk. 37; *S.C.* Barn. 9. There Lord *Hardwicke* said, that where a man surrendered a copyhold estate to the use of his will, though unattested, it shall direct the uses of the surrender; and that where the legal estate is in a trustee, it is obvious that the cestui que trust cannot surrender: but as equity follows the law, and as by law a will of copyholds need not be attested at all, *à fortiori*, it is not necessary in passing the equitable interest to have the instrument attested: Ib. But now, by 1 Vict. c. 26, all wills must be attested by two witnesses.

PAKENHAM *v.* BLAND AND HOSKINS.

July 13, 1725.

[LORD CHANCELLOR.]

On money received, promissory note is given by a person who had money owing him, the note is assigned; it shall not be looked on as a receipt in the hands of the assignee.

PAKENHAM had a running account with Bland, a banker, in whose hands he had 3000*l.* Bland paid him 1000*l.*, for which Pakenham, instead of a receipt gave him a promissory* note, who assigned it to the defendant Hoskins; Bland became a bankrupt; Hoskins sued the note; and on the trial, Pakenham not being able to prove that Bland, at the time of the assignment, was a bankrupt, Hoskins recovered; now bill is brought for an injunction, and to have a discovery, whether the assignment was not made after the time it bore date. [* 43]

It was insisted, that though this was a promissory note, it should be considered only as a receipt, he having at that time money in his hands, and could not be imagined he intended to be liable on the note at the same time that so much money was due to him; and if so, the 1000*l.* should be taken as so much money paid and deducted out of the 3000*l.*, so should come in for his distributive share of 2000*l.*

of the bankrupt's estate, and not be a creditor for 3000*l.* and pay the 1000*l.* note: no proof was made of bankruptcy at the time of the assignment, only that he could not pay it, but never kept out of the way.

CHANCELLOR.—That does not amount to an act of bankruptcy; and if people are so careless to give notes instead of receipts, it is more fit they should suffer, than innocent people who know nothing of their transactions. Bill dismissed.

The principle to be extracted from this case is, that where one of two innocent persons must suffer, there equity will throw the burden upon him who might, by the exercise of a greater degree of diligence or caution, have averted the loss.

This head of equity was well considered and developed by Lord *Langdale,* in the case of *Vandaleur* v. *Blagrave*, 6 Beav. 565; affirmed, 11 Jur. 935, where the grantor of an annuity redeemable at a definite period intrusted his agent, who was the agent also of the grantee, with the money for the purpose of redemption before the time it was redeemable; and the latter, having obtained a release of an assignment of the annuity from the grantee, became bankrupt without paying over the moneys so intrusted to him: it was decided that though it was a hard case, and that one of two innocent persons must suffer, yet that, inasmuch as the agent was first employed by the grantor, and as the latter had unnecessarily intrusted the agent with the money for redemption before the period it ought to have been handed over, the loss occasioned by the effects of the fraud must fall on the grantor: S. P. *Young* v. *Guy,* 8 Beav. 147. On a similar principle, the purchaser of an estate is bound to pay the common agent of the vendor and himself in cash, and not by writing off any debt which may have subsisted between him and the agent; for an authority to receive payment is not an authority to set off: *Todd* v. *Reid*, 4 B. & A. 210; *Russell* v. *Bangley,* ib. 395: unless the latter, being a creditor of the vendor, is authorized to receive payment in any manner, and then only to the extent of the agent's claim on the vendor: *Barker* v. *Greenwood*, 2 Y. & C. 414; et contra, *Young* v. *White*, 7 Beav. 506.

Another illustration of this principle occurs in the assignment of choses in action. It is an inflexible rule, that the assignee of a chose in action, assigned by an instrument

which is available only in equity, must take subject to all equities which subsist as against the assignor: *Coles* v. *Jones*, 2 Vern. 692; *Hill* v. *Caillovel*, 1 Ves. 123; *Priddy* v. *Rose*, 3 Mer. 86; *Woodyatt* v. *Gresley*, 8 Sim. 180; *Ord* v. *White*, 3 Beav. 357; *Burridge* v. *Row*, 1 Y. & C. C. C. 183; *Lacey* v. *Ingle*, 2 Phill. 413.

In order to perfect a valid assignment of a chose in action it is necessary, as against a subsequent assignee for value, or the assignee in bankruptcy, to give notice to the trustee of the fund, otherwise the incumbrancer who first gives notice, or the assignee in bankruptcy, will be preferred: *Dearle* v. *Hall*, 3 Russ. 1; *Loveridge* v. *Cooper*, ib. 30; *Etty* v. *Bridges*, 2 Y. & C. C. C. 486. Thus, where the real owner of shares in an insurance company caused them to be registered in the name of another in trust for him, but without specifying the trust, and the trustee fraudulently assigned the shares to a third party for value, who immediately perfected his title by notice, it was not competent for the cestui que trust to defeat the transaction on the ground that the trustee could not give to his assignee a better title than he had himself; for, were the plaintiff to succeed, as observed by Lord *Langdale*, "it would put an end to that important doctrine by which security is afforded to assignments accompanied with notice to the trustee or holder, and by which a good assignment and security is effected so as to prevent it being defeated by any subsequent assignment:" *Martin* v. *Sedgwick*, 9 Beav. 333: aliter where the trustee has only agreed to assign: *Murray* v. *Pinkett*, 12 Cl. & Fin. 764. But where the assignee had done all in his power to perfect his title, then, although a subsequent incumbrancer had been accidentally enabled to apprize the trustee of the fund of his charge thereon before the previous incumbrancer, the claim of the latter was not postponed: as, where he was the third mortgagee of a ship on a whaling voyage, and had duly given the prior mortgagees notice of his charge, but the master, being obliged to put into a foreign port to tranship the oil taken in the voyage into another vessel, drew bills against the oil upon the hypothecation of the bills of lading with the consignees in London, and the mortgagor induced a fourth party to advance him a sum of money on the representation, that there was no other charge on the proceeds of the consignment, than that claimed by the consignees, to whom the fourth party immediately gave notice, before the third incumbrancer was aware of the circumstances under which the transhipment was made; it was held that his (the third incumbrancer's) priority in time was to be disturbed: *Feltham* v. *Clark*, 1 De G. & S. 307.

The doctrine of notice to trustees in gaining priority is inapplicable with respect to incum-

brances on lands: *Jones* v. *Jones*, 8 Sim. 633; *Wiltshire* v. *Rabbits*, 14 Sim. 76; *Tylee* v. *Webb*, 6 Beav. 553; *Wilmot* v. *Pike*, 5 Hare, 14.

SHEPHARD *v.* BEECHER.

July 20, 1725.

SHEPHARD bound his son apprentice to the defendant, and entered into a bond of 1000*l.* penalty, the condition of which was, that he should faithfully discharge his duty as an apprentice. To be relieved against the bond is the end of the bill.

In the year 1715, there was a deficiency of 203*l.* in the son's accounts; which the father then paid, and wrote to the defendant, that he should trust his son sparingly, and call him often to account; the apprenticeship expired in 1719. In 1721, accounts were settled, when it appeared the son was 2762*l.* in debt.

It was insisted, the bond should not be put in force, as the deficiency arose from his own neglect, in not pursuing the father's directions. But suppose it should, not for more than the residue of the 1000*l.*, after deducting the 203*l.*, else it would make the bond be a larger security than what it was given for.

[* 44] * To which it was answered, as the father had entered into security, no letter of his, or directions, can diminish or retract it; and the master had a right to the service, be the danger what it would, that the father the security should thereby sustain.

On the payment of the 203*l.* no indorsement was made on it, so remains a security for 1000*l.*, and by not being indorsed off, may be looked on as a new agreement on the bond; may have benefit at law, and should not be taken from us; as the father is thereby bound at law and in conscience to take care of his son: if the father had paid a

deficiency more than what the bond would have extended to, equity would not have relieved him, and obliged to refund; so if equity would not interpose there, neither should it here, where have the law of our side.

But the Chancellor was of opinion, that as the security intended was not to exceed 1000*l.*, the 203*l.* should be deducted; else it would make the bond be a larger security than it was originally given for, and be to pay the 203*l.* twice over.

Ever since the case of *Shephard* v. *Beecher*, corroborated by the subsequent cases of *Bromley* v. *Goodere*, 1 Atk. 75; *Tew* v. *The Earl of Winterton*, 3 Bro. C. C. 489; *Mackworth* v. *Thomas*, 5 Ves. 329; it has been an established rule, that the penalty of the bond is never to be exceeded in ascertaining either the damages or debts against which the bond was intended to provide. It must be borne in mind, however, that the existence of a bond with a prescribed penalty for a violation of an agreement will not prevent the obligee from pursuing other remedies, as by an action of covenant or debt, to recover a larger sum than the penalty; *Ingledew* v. *Crippe*, 2 Ld. Raym. 814; for, as observed by Lord *Hardwicke*, "where penalties are inserted in a case of non-performance, this has never been held to release the parties from their agreement:" *Howard* v. *Hopkyns*, 2 Atk. 371; see also *Hobson* v. *Trevor*, 2 P. Wms. 191; *Chilliner* v. *Chilliner*, 2 Ves. 528; *Sloman* v. *Walter*, 1 Bro. C. C. 418; *Prebble* v. *Boghurst*, 1 Swanst. 369: and as a man cannot elect to break his engagement by paying for his violation of the contract, so if he has covenanted to abstain from doing a certain act, and agreed that if he do it he will pay a sum of money, he will be restrained in equity from doing that act: *French* v. *Macale*, 2 Dr. & War. 269. Where, however, a man has covenanted not to do a certain act, and to pay a certain sum by way of liquidated damages for the infraction of his agreement, if the covenantee has proceeded at law and recovered the whole amount stipulated to be paid, he cannot subsequently obtain an injunction in equity for the prevention of any future breach of the contract, *Sainter* v. *Ferguson*, 1 Mac. & Gor. 286.

The bond of a surety will be discharged in equity if the obligee withholds any information affecting the situation of the parties which it is material for the surety to know: *Rees* v. *Berrington*, 2 Ves. jun. 540; *Smith* v. *The Bank of Scot-*

land, 1 Dow, 272; *Calvert* v. *The London Dock Company*, 2 Keen, 638; *Bonser* v. *Cox*, 4 Beav. 379; *S. C.* 6 Beav. 110; *Archer* v. *Hudson*, 7 Beav. 551; *Railton* v. *Mathews*, 10 Cl. & Fin. 934. The mere non-disclosure or concealment of a probable expectation on the part of the obligee, will not vitiate the suretiship; thus in *Hamilton* v. *Watson*, 12 Cl. & Fin. 109, it was held, that A., having become surety to a banker for a cash credit *to be given* to a third party, was not entitled to be relieved from his suretiship by the fact that, immediately *after* he had executed the obligation, the cash credit was employed in paying off an old debt due from the third party to the bank.

DEGG *v.* EARL MACCLESFIELD.

July 21, 1725.

Where a person has a power of revocation and limiting new uses, granting to new uses will be a good execution, if has no other lands.

IF a man has a power of revocation, and of limiting new uses, and he grants to new uses, that has been over and over determined to be a revocation; but if he has other lands, then there is something for the words to operate on, and will not be a revocation. If a man has lands over which he has a power of revocation, and other lands, if he gives all his lands, that will not amount to a revocation, in respect of the lands over which he has a power; because the words may be satisfied as to the other lands.

Before the late Will Act (1 Vict. c. 26), it was not necessary, in order to support the validity of an appointment under a power, that the power should have been expressly referred to; it was sufficient that the intention to execute the power was apparent; non enim refert an quis assensum suum præbet verbis an rebus ipsis et factis: 10 Co. 52 *b*. But if the power was not referred to, the property must have been sufficiently indicated, so as to show that the disposition was intended to operate on it: *Ex parte Caswall*, 1 Atk. 559; *Hughes* v. *Turner*, 3 Myl. & K. 666: for where the words of the instrument,

affecting to pass the subject of the power, could have been satisfied by an appropriation of them to property not included in the power, the legal inference was that the power of appointment was not intended to have been executed: *Hoste* v. *Blackman*, 6 Madd. 190.

So far has this rule been carried, that where a testator, having freeholds of his own, and a power to appoint freeholds and copyholds, devised his freeholds and copyholds, it was held that the copyholds alone passed, and not the freeholds under the power, the testator's own freeholds satisfying the words of the will: *Lewis* v. *Lewellyn*, 1 Turn. & R. 104; S. P. *Tanner* v. *Elworthy*, 4 Beav. 487. So, a general bequest of money, were it to the exact amount of the sum comprised in the power, was not considered as an execution of the power; as, non constat that the gift might not be satisfied out of the general assets of the testator; *Jones* v. *Tucker*, 2 Mer. 533; *Webb* v. *Honnor*, 1 J. & W. 352; for, in a will of personalty, if the intention does not appear on the face of the will, evidence is not admissible to show the inability to satisfy out of the testator's property the dispositions he may have made, even although the Court may be assured that the power was intended to have been exercised: *Nannock* v. *Horton*, 7 Ves. 391; aliter as to realty, for every gift of land is specific: Ib. 399.

The rule of construction however was not inflexible, but was controlled where by necessary implication the testator's meaning was regarded as including everything over which he had a disposing power: *Standen* v. *Standen*, 2 Ves. jun. 589; *Att.-Gen.* v. *Vigor*, 8 Ves. 256, 286. Thus in the case of *Davies* v. *Fisher*, 5 Beav. 201, a widow had the power to appoint the residuary estate of her husband: by her will she recited the power, and declared that she was about to exercise it; and, in the appointing part, she directed that the residue of "her" personal estate "should go to *A*." Lord *Langdale* held, that the residuary estate of the husband was sufficiently indicated. So, where a married woman, having a testamentary power of appointment, made a will, it was intended to have been an exercise of the power; for, by the very act of making a will, she could have had nothing in view but to execute the power: *Curteis* v. *Kenrick*, 9 Sim. 443; sed vide *Lovell* v. *Knight*, 3 Sim. 275.

By the 27th sect., however, of the Act 1 Vict. c. 26, it is enacted, "that a general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he shall think proper, and shall

operate as an execution of such power, unless a contrary intention shall appear by the will; and, in like manner, a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

CHANCY *v.* WOOTTON.

[REHEARING ON EQUITY RESERVED.—LORD CHANCELLOR.]

A man indebted by bond to his servant gives her 500*l. for her long and faithful service; though the legacy is more than the bond, yet shall have both.*

A MAN indebted to his servant by bond 100*l.*, and also for wages which amounted to 15*l.*, makes his will, gives to the defendant, "in consideration of her long and faithful service done me, the sum of 500*l.*, to be paid her six months after my decease;" he gave her also several particular household goods, and gave to Chancy, "all my estates in trust to sell, and thereout to pay off the incumbrances, and all my debts, and the said several legacies above given,* and all the rest to Chancy," whom he made executor. That this shall be considered as a satisfaction, and not be paid the debt and have the legacy: it was argued, that the constant rule is, where the legacy exceeds the debt, for so much shall be a satisfaction, and for the residue a gift; where it is exactly equal it is a payment; as this is the rule of the Court, under the knowledge and influence of which men are supposed to act; to give it another construction, would be defeating people's wills, which they make on a supposition that the law is so, as has been often determined; and men should be just before they are generous.

[* 45]

To which it was said, a legacy ever and necessarily

imports a bounty; to *give* a man what he *owes* is an absurdity in terms, it was what he had a right to before; all said on the other side, is no more than that a man should be just before he is generous, which is certainly so, where he cannot be both, as where are not assets; but that is from the nature of the thing, and the impossibility of being both, and not from his intention. He appoints all his debts and legacies to be paid; if this should be held a payment of a debt, it would destroy his intent as a legacy. 1 Salk. 155, is in point. 1 Salk. 155.

CHANCELLOR.—It is established on the foot of his intention, that if the legacy be more than the debt, it is a satisfaction; because to be supposed a man should be just before he is generous; but do not see why one moral virtue should exclude another; but that is quite out of this case, for here is an express declaration of his intention, "for her long and faithful service," and then orders all his debts and legacies to be paid; whatever debt he owes, or legacy he gives, is to be paid; to do otherwise would be contrary to the will. So decreed the payment of the legacy, and also what he owed her.

It is said that a legacy shall in all cases be construed as a satisfaction in case there be a deficiency of assets: Toller, 337. This cannot be accepted without qualification; for, although undoubtedly where the legacy is equal to or greater than the debt, the presumption is that the debt is intended to be satisfied: *Brown* v. *Dawson*, Prec. Ch. 240: yet even this rule of construction is subject to exceptions, and will not apply to the case where the legatee is the servant as well as the creditor of the testator, *Chancy* v. *Wootton*; ("Legacies to servants," says Lord *Hardwicke*, "have never been held to be in satisfaction of debts," *Richardson* v. *Greese*, 3 Atk. 69;) nor to the case where the debt was contracted after the date of the will; *Thomas* v. *Bennet*, 2 P. Wms. 343: nor when the legacy is contingent; *Nicholls* v. *Judson*, 2 Atk. 300; *Crompton* v. *Sale*, 2 P. Wms. 553: nor, if the legacy be of smaller amount than the debt, will there be a pro tanto satisfaction; *Graham* v. *Graham*, 1 Ves. 263: nor where the debt and legacy are of different natures; *Eastwood* v. *Vinke*, 2 P. Wms. 614

nor will the gift of any specific chattel, as a picture, unless expressly so given, be construed as a satisfaction: *Byde* v. *Byde*, 1 Cox, 49.

MOZENE, &c. CREDITORS OF ABRAHAM.

Bankruptcy clerk of a commission, in the presence of the person at whose instance he sued out the commission, no other person being by, opened a scrutore, and took out several papers, and made a pretended sale; ordered to be examined on interrogatories, and pay the real value of the goods, and be removed from the clerkship.

METCALF, by order of Eliot, sued out a commission of bankruptcy, to which he was clerk; Abraham was found a bankrupt; Metcalf in the presence of Eliot, no other person being by, took away a scrutore and opened it, in which were all the papers of the bankrupt, and made a
[*46] *pretended sale by an appraiser, no creditor being by: on petition for that purpose, he was ordered to be examined on interrogatories, as to the real value of the goods, and pay the real value, and all costs occasioned by this irregularity; and all the goods not disposed of to be delivered over; and removed from the clerkship.

No person in a fiduciary character can be permitted in such a manner to deal with the subject of his trust: see ante, *Whitackre* v. *Whitackre*, p. 13, in notis.

WOOD.

One cannot be both clerk and commissioner.

JOHNSON was both clerk and commissioner to a commission of bankruptcy, by which means had fees for both, and thereby four commissioners were always present, including the clerk, whereas three are sufficient.

On petition he was removed.

COMBS.

Commission not sat on three months superseded.

A COMMISSION was taken out, and not sat on till three months after.

CHANCELLOR.—It plainly shows it was done to protect the estate; the commission shall be superseded for example-sake, that such things should not be practised.

By Lord Loughborough's Order, 26th of June, 1793, a commission of bankrupt was supersedable for want of prosecution at the expiration of 14 days: see *Ex parte Getting*, 2 M. D. & De G. 498; *Ex parte Nicholson*, 3 M. D. & De G. 295. By the 1 & 2 Will. 4, c. 56, s. 12, fiats are substituted for commissions, and when filed, it is a record of the Court of the bankruptcy; and, by the General Order of the 12th of January, 1832, it must be filed within seven days from the date of the fiat; and, if not filed within seven days, any other creditor will be permitted to take out a new fiat: *Ex parte Gerothwhol*, 4 Deac. & Ch. 48. A commission issued in May, 1826, but not opened till March, 1827, was superseded on the ground of improper delay: *Ex parte Best*, M. & McAr. 63.

Now, by 12 & 13 Vict. c. 106, fiats are abolished, and a petition for an adjudication of bankruptcy is substituted; and, if the adjudication be not obtained within three days after the petition, any other creditor may, under the 96th section, apply to the Court to proceed on such petition for an adjudication.

WISE.

Bond given to the father-in-law of the future husband defeasanced, not to be put in suit unless misfortunes should happen to the husband; fraudulent.

BOND was given to the father-in-law of the future husband for 500*l.* payable at a day certain, but defeasanced not to be put in suit, but for security of the daughter, in case any misfortunes should happen to the husband, to be paid before other creditors.

CHANCELLOR.—This is a fraudulent bond on the face of it to disappoint creditors.

See post, *Procter* v. *Warren*, p. 78.

WHITLOCK.

Person under age buys goods; when he comes of age cannot be a bankrupt in respect of them. Action will lie against commissioners for finding a man a bankrupt if he be not so.

A PERSON being under the age of twenty-one bought goods, and after the age of twenty-one committed an act of bankruptcy, in respect of those goods, on which a commis-

sion issued. Lord Chancellor *Macclesfield* doubted, whether he might not be a bankrupt; but the Chancellor * was clear of opinion he could not; and said, if commissioners find a man a bankrupt who is not so, action will lie against them. [* 47]

Although as a general rule it may be laid down that an infant cannot be a bankrupt; yet if a fiat has issued, and the infant has held himself out to the world as of age, and *sui juris*, a petition by him to supersede a fiat which has so issued against him will be dismissed, and he will be left to his action at law against the commission; *Ex parte Watson*, 16 Ves. 265; for he is "no more entitled to any favour or assistance than a feme covert, who lives apart from her husband and holds herself out as a feme sole and contracts debts, is entitled to any summary relief from the judges at common law; who always leave a woman of that description to make the best she can of her plea of coverture in any action brought against her, and constantly refuse to interfere so as to afford her any summary relief:" per Lord *Eldon*, ib. 266. So, where it appeared that the bankrupt was an infant, but a year before the fiat had issued had made an affidavit that he was of age, his application to annul was dismissed: *Ex parte Bates*, 2 M. D. & D. 337.

With reference to the capacity of infants generally to contract, Sir *J. Knight Bruce* has thus expressed himself, "Unquestionably it is the law of England, that an infant, however generally for his own sake protected by an incapacity to bind himself by contracts, may be doli capax in a civil sense, and for civil purposes, in the view of a Court of equity, though perhaps only when pubertati proximus or older, and not, I suppose, at so early an age as in a criminal sense, and for criminal purposes, and may therefore commit a fraud for which, or the consequences of which, he may after his majority be made civilly answerable in equity:" *Stikeman* v. *Dawson*, 1 De G. & S. 109. In that case, however, in the absence of fraud, the infant was protected: Ib. 90.

FREAK.

Cannot be a special return to a commission of lunacy.

SPECIAL return was made to a commission of lunacy, which was filed.

CHANCELLOR.—He must be found either mad or not mad; if the return had not been filed, it had been no return; but since it is filed it must be quashed, and an alias commission go.

FRANKLIN.

Aug. 4, 1725.

Commission of review is discretionary, and refused where the end was to bastardize issue.

A MARRIAGE was had, and after a second marriage, by which was issue, and none by the first; both the marriages were had in Ireland. Sentence was in the Consistory Court in Ireland for the marriage, which sentence was reversed by the delegates there.

Now application is made for a commission of review.

Which was objected to; for that though commissions of review had frequently gone, in respect of sentences relating to wills in Ireland, that was because the law here and there, as to them, are both the same, but it is not so in respect of marriage.

LORD CHANCELLOR.—By the 32 H. VIII. c. 38, where there is issue, a marriage shall not be set aside for præcontract; that still is the law of Ireland, though altered here by 2 & 3 Ed. VI. c. 23, and though 2 Ed. VI. is repealed by 1 P. & M., yet it is revived by 1 Eliz. c. 1.

But though the law be different, if a commission should go, they must judge by the Irish laws.

A commission of review is not of right, but gratuitous and discretionary; that it is so must have been for some reasons, to re-examine where were visible hardships. The only end aimed at here, by granting the commission, is to bastardize the issue, which shall never advise the king to do; if there had been no issue, had been very different; let them enjoy the good fortune of their legitimacy.

By the 3rd sect. of 2 & 3 Will. IV. c. 92, the powers of the High Court of Delegates were transferred to the King in Council, and the commission of review was thereby abrogated; and by the 3 & 4 Will. IV. c. 41, after enacting that certain persons holding certain offices should thereafter constitute a committee, to be styled the Judicial Committee of the Privy Council, it was declared that all appeals, which by the 2 & 3 Will. IV. c. 92, lay to the King in Council, should thenceforth be presented to, and decided by, such Judicial Committee.

By the 26 Geo. II. c. 33, precontract is no longer a cause for dissolving a marriage in England. The divorce in the spiritual court is pro peccatis, and this cannot be after the death of either the husband or wife, for by such means every one might be disinherited; 4 Vin. Abr. 222; and the grant of the commission being prayed of the grace and benignity of the crown, and to be regulated by sound discretion (see *Eagleton* v. *Kingston*, 8 Ves. 438), there could obviously have been no good resulting from the concession in *Franklin's case*.

[* 48] * POPPING. ON RHODES'S WILL.

Commission of review granted pending an indictment of forgery of the same will.

SENTENCE was had for the will; and after Rhodes was indicted for forging it; pending which indictment, on suggestion of subsequent discoveries as to the forgery, and that the sentence was wrong, apply for a commission of review.

Which was opposed, as not being proper till after the trial of the indictment, for it would be disclosing the king's evidence; and if sentence should be had against the will, might influence the jury on the indictment.

On the other side it was said, it was the constant course to grant a commission of review, where only one sentence, or where one of the delegates dissents; and it would be very hard to have the commission depend on the success of the indictment, as the law is very tender in fixing a crime on a particular person; but in the Spiritual Court the only question will be, whether it be forged or not.

CHANCELLOR.—Here are subsequent discoveries, and they say, besides that, the first sentence was wrong. The cause has been but once heard, and it would be very hard not to grant a commission of review; and no occasion to wait the issue of the indictment, that depends on its own circumstances and particular niceties.

On appeal may bring new matter; aliter *in review, unless be a clause to receive it.*

On appeal may bring new matter, but in review must proceed *ex eisdem* acts, unless there be a clause to receive new matter, which was added here.

Doubted whether should not pay costs of the trial before

the delegates, as in granting a new trial: but Sir *Nathaniel Floyd* informing the Court that it is never done on review; no costs.

The power to grant or withhold the commission, as we have seen by the preceding case, having been discretionary in the Court of Chancery, it seems to have been considered no ground for withholding the commission, that a new investigation might bring to light matter, by means of which the will might be invalidated and the detection of the forgery consequently facilitated.

On a somewhat analogous principle, where a defendant, by an affidavit made in a cause, had sworn in a certain manner, upon motion for the production of documents, and among others, of the affidavit, he was not permitted to resist its production on the ground that if produced the plaintiff might be enabled to substantiate a charge of perjury then in course of prosecution against him; *Rice* v. *Gordon*, 13 Sim. 580; where, however, the plaintiff in equity had preferred an indictment against the defendant since the institution of the suit, the defendant's time for answering was extended until after the trial of the indictment: *Lee* v. *Read*, 5 Beav. 381.

Second Resolution.—It seems to be doubtful whether, under the substituted appellate jurisdiction of the 3 & 4 Will. IV. c. 41, a person who is desirous of adducing evidence not brought before the Court below can do so without praying either in his petition of appeal, or specially, that such evidence may be received: *Canepo* v. *Larios*, 2 Knapp, 276; *Meiklejohn* v. *Att.-Gen.*, ib. 330; *Jephson* v. *Riera*, 3 Knapp, 130. In the case of *Hughes* v. *Porral*, 4 Moo. P. C. C. 41, evidence not adduced in the Court below, or forming part of the transcript, was admitted on motion, to be used at the hearing of the appeal, but subject to all just exceptions.

LANNOY *v.* LANNOY.

Husband has a large fortune come to him in right of his wife, part of which was in the stocks, which he has transferred to himself and his wife jointly; they shall survive to the wife.

MR. LANNOY, on his marriage with Mr. Frederick's daughter, settled 500*l.* per annum on her; he after surrendered some copyhold estates to the use of his will which he made, and gave the copyhold to his wife; her father, a free-
[* 49] man of London, died, whereby she became * intitled to one fifth of one third of his personal estate; and 1500*l.* was reported due to Mr. Lannoy in right of his wife. Several specific securities were transferred to him and her jointly; Mr. Lannoy after levied a fine, and made a new settlement, and increased her jointure 300*l.* per annum, but never altered his will. Bill was brought to make the securities, which were transferred to the husband and wife, part of the personal estate of the husband.

CHANCELLOR.—The settlement is a revocation of the will, for such lands as are comprised in it; but the copyhold is not, and therefore passes by the will.

The stocks undoubtedly belonged to the husband; the only question is, whether he has not done something to alter that. A husband may purchase to himself and his wife; here he takes to himself and his wife, which is the same thing; there is a considerable accession of fortune to the husband; and as this came by her, it would be very hard by equity to take from her what the law gives her. So for so much of the bill as sought to make the stocks in their joint names the estate of the husband, to be dismissed.

Where the property of a woman comes under the definition of a chose in action, in contradiction to property which she has in her actual possession and enjoyment, and she marries, she surrenders her rights thereto and it becomes the property of her husband,—absolute or qualified as the case may be: absolute, if he reduces it into possession; qualified, *i. e.* subject only to her equity for a provision out of it, if, to obtain it, he is obliged to have recourse to a Court of equity.

The mere right in the husband, unexercised, of reducing his wife's chose in action into possession will not avail to deprive her surviving, or her representatives, of the principal moneys to be recovered: Co. Lit. 351 *b*. Thus, for instance, stock which had been transferred into the name of a married woman, without the intervention of any trust or declaration for her separate use, was held to be her absolute property against the claims of the husband's representatives, who contended that the transfer of stock into the wife's name was equivalent to a payment made to her; and that payment to a married woman was in fact payment to her husband: but Sir *W. Grant* observed, that "there is a great difference between a transfer of stock and payment of money. The interest in stock is properly nothing but a right to receive a perpetual annuity subject to redemption, a mere right; therefore the circumstance that government is the debtor makes no difference, a mere demand of the dividends as they become due having no resemblance to a chattel moveable, or coined money capable of possession and manual apprehension:" *Wildman* v. *Wildman*, 9 Ves. 177. It matters not that the stock has been actually transferred into the name of the husband, if in the character of trustee for his wife: *Wall* v. *Tomlinson*, 16 Ves. 413.

The true criterion of reduction into possession is, Has the subject-matter ever unconditionally reached the hands of the husband? Slight indications of ownership will not suffice to operate as a reduction against the wife; as where the wife was payee of a promissory note, the receipt of interest by her husband is not a reduction of the note into his possession so as to exclude the claim of his wife surviving: *Nash* v. *Nash*, 2 Mad. 133. Even at law, the receipt by the husband of the interest on a promissory note, of which his wife was payee, was held not to operate as a reduction of the note into his possession: *Hart* v. *Stephens*, 6 Q. B. 937. A change in the security, in which the chose in action may be invested, at the instance of the husband, is primâ facie such a dealing with the property as will amount to a reduction; thus, the transfer after marriage, by way of settlement of stock standing in the maiden name of the wife into that of trustees for her separate use, was held such a reduction by the husband as to exclude the wife's right by survivorship, and to pass to the assignees of

the husband subject to her equity to a settlement out of it: *Pringle* v. *Hodgson*, 3 Ves. 617; *Wombwell* v. *Laver*, 2 Sim. 360; *Burnham* v. *Bennett*, 2 Coll. 254; *Hansen* v. *Miller*, 14 Sim. 22. A mere appropriation of the securities is not enough; *Blount* v. *Bestland*, 5 Ves. 515; nor even if the transfer of them is by an investment into the joint names of the husband and wife, and he thereupon increases her jointure, will this circumstance be held a sufficient ground for depriving the widow of her right by survivorship; *Lannoy* v. *Lannoy*, for the inference, sought to be deduced from this fact, is opposed to the legal rule, that nothing short of an actual reduction into possession shall prejudice the wife's right by survivorship in such cases: see *Ellison* v. *Elwin*, 13 Sim. 309. So, where the husband had merely authorized executors, who were the trustees of a fund to which his wife was entitled, to hold it for his wife's separate use and afterwards became bankrupt, this was held not equivalent to a reduction, although the executors had assented; for "the directing or consenting to an investment consistent with the wife's equities cannot be considered as an act destroying such equities by being a reduction into possession;" *Ryland* v. *Smith*, 1 Myl. & Cr. 57; nor will a mortgage by the husband of his wife's equitable chattels real displace her equity to redeem as against his assignee: *Clark* v. *Burgh*, 2 Coll. 221.

Thus far we have considered the rights of the husband and wife, where the chose in action is susceptible of being immediately reduced into possession: where however her interest is reversionary, and there has been either an assignment for value or by operation of law in consequence of the bankruptcy of the husband, it was long undetermined (see *Grey* v. *Kentish*, 1 Atk. 280; *Bates* v. *Dandy*, 2 Atk. 207; *Salisbury* v. *Newton*, 1 Eden, 370) whether in either of these cases the assignment would bind the wife surviving. That it did not bind her in either case was expressly decided in *Hornsby* v. *Lee*, 2 Mad. 16; and, in *Purdew* v. *Jackson*, 1 Russ. 70, Sir *Thomas Plumer* lays it down, "that all assignments made by the husband of the wife's outstanding personal chattel which is not or cannot be then reduced into possession, whether the assignment be in bankruptcy or under the insolvent acts, or to trustees for the payment of debts, or to a purchaser for valuable consideration, pass only the interest which the husband has subject to the wife's legal right by survivorship." This doctrine, thus clearly stated, has been corroborated by all the later authorities: see *Honner* v. *Morton*, 3 Russ. 65; *Watson* v. *Dennis*, 3 Russ. 90; *Stamper* v. *Barker*, 5 Mad. 157; *Hutchings* v. *Smith*, 9 Sim. 137; *Ellison* v. *Elwin*, 13 Sim. 309; *Ashby* v. *Ashby*, 1 Coll. 553; *Le Vasseur* v. *Scratton*, 14 Sim. 116. Courts of equity

have carried this doctrine a step further, and will not even take her consent to part with such interest so as to bind her surviving, even if the assignment had been to a particular assignee for value: see *Richards* v. *Chambers*, 10 Ves. 580; *Lee* v. *Muggeridge*, 1 Ves. & B. 118; *Pickard* v. *Roberts*, 3 Mad. 384; *Stiffe* v. *Everitt*, 1 Myl. & Cr. 37; *Batt* v. *Cuthbertson*, 4 Dr. & War. 392.

One other point connected with the assignment of the reversionary interest of a married woman has been long agitated, and can only very recently be said to be definitively settled; viz., whether, where the interest to which the wife is entitled is absolutely vested, though the enjoyment is postponed until after the death of a person to whom the previous life estate has been given, it is competent for her, by obtaining a release from the owner of the previous intermediate estate, effectually to deal with her interest thus accelerated into a present right. The affirmative of this proposition has been held by Sir *Lancelot Shadwell*, in the recent cases of *Creed* v. *Perry*, 14 Sim. 592; *Hall* v. *Hugonin*, ib. 595. These decisions, however, are directly opposed to the judgment of Sir *Edward Sugden* in the case of *Box* v. *Box*, 1 Dru. 42; and Lord *Langdale*, in *Story* v. *Tonge*, 7 Beav. 91, thought the question of too doubtful a character to be adjudicated on petition, and declined to make any order thereupon: see also *Whittle* v. *Henning*, 11 Beav. 222. The point however is now finally set at rest, by the decision of the Lord Chancellor, in the last case, on appeal overruling the judgments of the Vice-Chancellor: 2 Phillips, 731.

With reference to the interest of a married woman in her real estate, to the rents of which her husband is legally entitled during their joint lives, a question has arisen as to whether the husband's particular assignee for value, or his general assignee, could obtain the aid of a Court of equity to effectuate the assignment without submitting to the same condition which such Court imposes on the husband seeking its assistance for the reduction of the wife's chose in action: and it has recently been decided, that although her husband can legally assign his life interest therein (*Bosvil* v. *Brander*, 1 P. Wms. 458), yet, if his assignee is obliged to seek the aid of a Court of equity to effectuate the transaction, the Court will withhold its assistance for that purpose, until it has secured to the wife the means of subsistence out of the property which the law intended for the maintenance of both: *Sturgis* v. *Champneys*, 5 Myl. & Cr. 97. A similar reasoning was applied to the case where there was a fund in Court, the produce of the rent of real estate, though there had already been a settlement on the wife: *Freeman* v. *Fairlie*, 11 Jur. 447. In *Hanson* v. *Keating*, 4 Hare, 1, Sir *J. Wigram*, somewhat reluctantly, followed the decision of the Lord Chancellor, in *Sturgis* v. *Champneys*.

TURNER *v.* TURNER.

Subpœna for costs may be taken out either against the infant or prochein amy.

INFANT brought a bill by his prochein amy; a trial at law was directed, in which was nonsuit, and the bill dismissed with costs.

The register informed the Court, that the course in such cases is to give costs generally, but may have a subpœna against either.

Strictly speaking, an infant plaintiff is not answerable for costs in a suit of equity; the next friend is liable: Mitf. 26: and the reason is, that the infant cannot, while under age, disavow the suit: Sayer on Costs, 84. The prochein amy is primâ facie liable to the plaintiff's attorney for his costs as well as to the defendant: *Marnell* v. *Pickmore*, 2 Esp. 473; *Ward* v. *Ward*, 6 Beav. 251; *Tarbuck* v. *Woodcock*, ib. 581. When the infant comes of age he may disavow the suit; and, if it be shown to have been improperly instituted, the next friend will be ordered to pay his costs: *Guy* v. *Guy*, 2 Beav. 460; see also *Starten* v. *Bartholomew*, 6 Beav. 143: but if no misconduct be proved against the next friend, either in the institution or progress of the suit, the late infant, though he should not adopt the proceedings, cannot make the next friend pay the costs: *Anon.* 4 Mad. 461. In the case of *Taner* v. *Ivie*, 2 Ves. 465, the next friend was allowed his costs, though the bill had been dismissed.

ELDRED *v.* CHILD.

Aug. 7, 1725.

[ON APPEAL FROM THE ROLLS.]

A will was suggested to have been burnt, and that examined in the Spiritual Court, will not examine into it here.

PHŒBE WALLIS, being possessed of a personal estate, made her will 1723, and thereby gave all to the plaintiff; the will was destroyed in her lifetime, and after died; plaintiff insisted it was done by the defendant, and the defendant, that it was done by the testatrix; this matter was litigated in the Spiritual Court, and administration granted to the defendant, as next of kin. Now bill is brought to set up the will, as being a fraud, for which can have no remedy in the Spiritual Court, as have no transcript of it; and insisted, that if it was destroyed in the life of the testatrix,* could have no remedy there; aliter if after; and cited Swinburn, 263; so insisted to have issue directed to try, whether it was destroyed by the testatrix. But the Chancellor was of opinion, that the Ecclesiastical Court had jurisdiction, and have no occasion to come here; for if it were destroyed by the defendant, are not without remedy, for might bring action. So affirmed the decree.

[* 50]

The principle laid down in the case of *Eldred* v. *Child* is one of great practical importance, in considering the extent of jurisdiction which Courts of equity will assume in matters especially within the province of Ecclesiastical Courts. The principle may be thus stated: that a Court of equity will not interfere with questions exclusively cognizable by another tribunal; thus, in the words of Lord *Hardwicke*, "A will cannot be set aside for fraud and imposition in Chancery, because a will of personal estate may be set aside in the Ecclesiastical Court for

fraud, and of real estate at law:" *Bennet* v. *Vade*, 2 Atk. 324; *Plume* v. *Beale*, 1 P. Wms. 388; *Kerrick* v. *Bransby*, 7 Bro. P. C. 437, Toml. ed. A distinction, however, is to be observed between fraud or imposition practised on the testator in his lifetime, and fraud practised after his death in obtaining probate; in the former case the jurisdiction is exclusively in the Ecclesiastical Court: *Eldred* v. *Child*: in the latter the fraud is examinable in a Court of equity: *Barnesly* v. *Powel*, 1 Ves. 284.

It is not easy to explain the principle of this distinction, or why the Court of Chancery should repudiate the jurisdiction in one case more than the other. In both, the assumption is that the Ecclesiastical Court has been imposed upon in the matter of the probate; and the fraud, if any, will in its consequences be as much a fraud on the testator, if his bounty has been diverted by a false representation of the character of the legatee, as if the spoliation of the will conferring that bounty had occurred after the testator's death. The distinction however has prevailed, and is not to be here called in question. Assuming to act upon this rule, the House of Lords, in the late case of *Allen* v. *Macpherson*, 1 Ho. L. Ca. 191, has gone a step further, and decided that a Court of equity had no power to entertain a suit, the object of which was to have the residuary legatee declared a trustee for the plaintiff, and which charged that the residuary legatee had, by undue influence, prevailed on the testator to revoke by a final codicil previous bequests in the plaintiff's favour; but it is to be observed, that both Lords *Cottenham* and *Langdale* dissented from this judgment of the House as confounding jurisdictions essentially distinct.

The jurisdiction of the Ecclesiastical Court is conversant with questions concerning the factum of the document which is submitted for probate; the Court of Chancery, being only a Court of construction, cannot venture upon this office without the previous fiat of the Ecclesiastical Court. The Court of Chancery cannot affix a trust upon any testamentary paper whose validity has not been previously recognised in the Court of Probate. It is neither within the province of the Ecclesiastical Court to declare a trust, nor within its powers or machinery to enforce a discovery whereby that trust is to be ascertained. In the words of Lord *Cottenham*, "When the Ecclesiastical Court has vested in an individual the legal title to property by granting him probate, then the Court of Chancery assumes that jurisdiction which belongs to it over all titles, over all interests, over all estates, where a proper case arises of attaching a trust upon that individual; it does so with land, it does so with money, it does so with every species of property:" 1 Ho. L. Ca. 216. The nature of this distinction is well illustrated in the

case of *Barnesly* v. *Powel*, 1 Ves. 284, where Lord *Hardwicke* asserted the jurisdiction of the Court of Chancery, though he admitted that it had no authority to set aside the probate of a will. There he said that he should not scruple to decree that the defendant who had forged a will and obtained probate should stand as a trustee in respect of that probate: see also *Segrave* v. *Kirwan*, 1 Beatty, 157.

Lord Chief Baron *Gilbert*, in his reports, lays it down that "Courts of equity may, in notorious cases, declare a legatee who has obtained a legacy by fraud to be a trustee for another; as, if the drawer of a will should insert his own name instead of the name of a legatee, no doubt he would be a trustee for the real legatee; and nobody has thought that the declaring a trust in those cases is an infringement upon the Ecclesiastical jurisdiction:" *Marriot* v. *Marriot*, Gilb. Cas. 208, 209.

WILLSON *v.* DABBS.

De Term. Sanct. Mich. October 30, 1725.

DECREE was had by default, and a petition for rehearing; the person in possession of the decree did not attend at the rehearing; bill dismissed with costs as to the petitioner. Ante, 6.

In the case of *Fraser* v. *Gordon*, 3 Cl. & Fin. 718, the appellant not appearing, the appeal was also dismissed; but Lord *Brougham* said, that even on the supposition that the appeal was abandoned, still it was necessary for the House to hear the respondent's case opened on the merits, so that they might see that the orders complained of were well founded: as the House had to pronounce a judgment, it became requisite to hear some reasons for it. The order which is made under such circumstances is not that the decree be affirmed, but that the appeal be dismissed for want of prosecution: *Scanlan* v. *Usher*, 8 Cl. & Fin. 561. And when an appeal was called on in regular course, and the appellant's counsel were not present, but the appellant himself was, he was ordered to pay the costs of the day, as the delay was not attributable to his fault: *Godson* v. *Hall*, 7 Cl. & Fin. 549. Where the counsel for neither party were present when the appeal was called on, it was ordered to be dismissed for want of prosecution, and costs were not ordered to either party: *Sherburne* v. *Middleton*, 9 Cl. & Fin. 72.

MACARTE *v.* GIBSON.

Whether executor to be allowed interest for money paid by him before he received any of the testator's.

MONEY was due to the testatrix, which was out at interest; the executor laid out considerable sums of money of his own in payment of the testatrix's debts, before any money came to his hands, as he suggested. Decree was for the payment of the money, and that he should have all just allowances; it was insisted, he should have interest for the money so laid out.

CHANCELLOR.—If interest be a just allowance, Master will allow it; if not, except to his report. Though I will not say that in no case executor shall have interest allowed, yet *shall be extremely cautious of doing it, for money expended [* 51] before he receives out of the estate; for I very well see the consequence of it.

The Master informed the Court, that he never allowed interest, unless was a particular order for that purpose. So the Court reserved the consideration of interest and costs till after the Master's report.

The general rule, with respect to the allowance of interest on advances by an executor, is that the Court, in sanctioning it, must be clearly satisfied of the exigency under which the loan was made. Thus, where an executor has either borrowed or advanced out of his own pocket moneys towards satisfaction of his testator's debts which carried interest, there the Court will make him allowance for interest on the sum so borrowed or advanced out of his own pocket: *Small* v. *Wing*, 5 Bro. P. C. 72, Toml. ed. The time from which interest is to be calculated, on sums which are allowed to carry interest, is from the time when the balance on the general report is struck; for

until such report, non constat that the executor is not in possession of funds belonging to the testator's estate: *Gordon* v. *Trail*, 8 Price, 416.

THOMAS *v.* PUDDLESBURY.

Nov. 9, 1725.

A long Exchequer annuity deposited in a person's hands as a security, could not be subscribed in the year 1720, *for had it not as a trustee, but for a particular purpose.*

A. HAD a long Exchequer annuity for ninety-nine years, which was settled on the husband for life, remainder to the wife for life, remainder for provision for children; and had liberty, by decree of the Court, to borrow 300*l.* on it, which was done, and this placed in B. the lender's hands as a security till payment with interest. B. subscribes it into the South Sea Stock in 1720. A. brings his bill for a reconveyance; it was held, he could not be considered as a trustee, as he had it only for a particular purpose, and had no authority to subscribe. So decreed to account for the profits, and to reconvey on payment of principal, interest and costs.

The case of *Thomas* v. *Puddlesbury*, it is to be observed, was not one of an ordinary mortgage, but in the nature of a Welsh mortgage (see *Ord* v. *Smith*, in notis, ante, p. 9). It was a bill for the redemption of an Exchequer annuity, which had been mortgaged for the purpose of securing the repayment of a sum advanced upon it. Mortgages of stock and of personal chattels differ in one respect from ordinary mortgages; viz., that the mortgagee may, upon the mortgagor's default in performing the proviso, have recourse to the expedient of a sale without a decree for foreclosure: *Tucker* v. *Wilson*,

1 P. Wms. 261; *Lockwood* v. *Ewer*, 2 Atk. 303: and a right to the same kind of relief would exist in equity in the case of a simple assignment of a policy of assurance, unless where the mortgagee had contracted himself out of the exercise of such right: *Dyson* v. *Morris*, 1 Hare, 413, see p. 422: and there seems to be no precedent for a decree of foreclosure in such cases. A mortgage of a reversionary interest in stock is however the subject of foreclosure: it was contended that it did not admit of foreclosure, the right being merely equitable, but in analogy to the common practice of a second mortgagee foreclosing the mortgagor, without redeeming the first mortgage, the argument did not prevail: *Slade* v. *Rigg*, 3 Hare, 35. In the cases of *Tucker* v. *Wilson* and *Lockwood* v. *Ewer*, ubi supra, the bills having been brought after the time had expired for re-payment of the loan, and the stock having become enhanced in value subsequently to the sale of the security by the mortgagee, the bills were respectively dismissed.

It is quite clear that if the mortgagee should avail himself in the first instance of his right to sell, he will remain accountable for any surplus; as where upon a loan of 70,000*l.* a sum of 20,000*l.* South Sea Stock had been mortgaged to the lender, the latter having realized the stock which far exceeded the sum advanced was declared to be a trustee of the surplus for the mortgagor: *Harrison* v. *Hart*, Com. 393. For the form of a decree for the redemption of specific chattels, see *Kemp* v. *Westbrook*, (1 Ves. 278); Belt's Supplement, 149.

A mortgage of securities differs materially from a transfer of stock by way of loan: see *Forrest* v. *Elwes*, 4 Ves. 492; *Vaughan* v. *Wood*, 1 Myl. & K. 403. Where (before the 2nd and 3rd Vict. c. 37) the borrower had contracted that the sum advanced should be repaid with legal interest, or that he should, at the option of the lender, transfer so much stock as the sum lent would produce on the day it was payable, without putting capital or interest to any kind of risk, such contract was held usurious and void: *Barnard* v. *Young*, 17 Ves. 44; *Powney* v. *Blomberg*, 14 Sim. 179.

In the case, where a transfer of stock is made by way of loan, the transferor of the stock is virtually the lender of so much money as the price of the stock, at the date of the transfer, or at the period agreed upon for its re-transfer, is worth. If the time for its re-transfer has expired, the transferee or borrower cannot relieve himself at any future time by offering to transfer the same quantity of stock when depreciated in value. If, however, the stock had been offered at the stipulated period the condition would have been satisfied, for the obligation on the one to transfer, and the other to accept it, would have been mutual; but that mutuality is at an end by the breach of the

condition to re-transfer at the specified period.

In cases where trustees of stock have committed a breach of trust in selling, Courts of Equity give to the parties beneficially interested an option to have either the stock itself or the money produced by it, with interest: *Bostock* v. *Blakeney*, 2 Bro. C. C. 653; *Byrchall* v. *Bradford*, 6 Mad. 235. There is, however, some conflict in the decisions as to the extent to which a trustee may be liable where he has passively omitted to make any investment; Lord *Langdale*, following the judgment of Lord *Gifford*, in *Hockley* v. *Bantock*, 1 Russ. 141, holding that where an option is given by will to trustees to invest either on mortgage or in the funds, and the trustee, acting in complete violation of his duty, does neither, the cestui que trust has a right to select that investment which would be most advantageous to him. "It is not," observed his Lordship, "I conceive, for the trustee who has done the wrong to exercise an option so as to charge himself in the least prejudicial mode:" *Ouseley* v. *Anstruther*, 10 Beav. 459; see also *Watts* v. *Girdlestone*, 6 Beav. 188. In the case of *Marsh* v. *Hunter*, 6 Mad. 295, Sir *J. Leach* held the trustees not liable under similar circumstances, and this decision is approved and has been adopted by Sir *J. Wigram*, in *Shepherd* v. *Mouls*, 4 Hare, 500; and by Sir *J. Knight Bruce*, in *Rees* v. *Williams*, 1 De G. & Sm. 314.

RICHARDSON *v.* MITCHELL.

Nov. 10, 1725.

If a person answers, he must answer the charge in the bill, though what he answers might have been good by way of plea.

BILL brought to set aside a purchase, and to have a discovery of the site and profits of the estate. Defendant by answer insists, that he is a purchaser, and that he is not obliged to make a discovery: to which exception was taken for not answering; and that exception allowed. In support of the exception the case of *Stephens* v. *Stephens*, before Lord *Macclesfield*; bill was brought for a discovery of the

Stephens v. *Stephens.*

rents and profits of an estate, which he claimed by will from a common ancestor: defendant says, he is entitled to the estate; and therefore till the right is determined, he was not obliged to give account of rents and profits. Lord *Macclesfield* said, this might have been good by way of plea, but having answered, must answer the charge of the bill. So lately the case of *Edwards* v. *Freeman;* bill brought for account, the defendant controverted the right, and said, was not obliged to give an account before that was settled; and your Lordship was of opinion, that having answered, the charge of the bill must be answered. So resolved here.

Edwards v. *Freeman.*

See *Floyer* v. *Sydenham*, ante in notis, page 2.

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* CLERKE *v.* JACKSON. [* 52]

Settlement before marriage in bar of dower and thirds, but not to extend to household goods; at the time of the settlement had an hospital, and household-goods there; of these shall have thirds. But the decree reversed in the House of Lords.

A MAN before marriage settles 300*l.* per annum on his wife, in bar of dower, thirds at common law, or what she might claim by custom; provided *this shall not extend to any legacy he shall give her, nor to all or any household goods, or utensils of household stuff, plate, jewels, linen, &c., which he should have at the time of his decease.*

At the time of making the settlement he was under a contract with the commissioners of the navy, to take care of wounded sailors; for which purpose had an hospital properly furnished for that use, 700 pair of sheets, bedding, &c.,

proportional, all which things were made use of in that house, and nowhere else.

Wife brings her bill for her share of these goods, as being household stuff, and her husband's at the time of his death, so clearly within the description.

To which it was answered, that though these things are within the letter taken in full latitude, yet they are not within the intention; which was in respect of such household stuff, which he employed for his own domestic use, and not in the way of trade, as this was: suppose had been an upholsterer, these words would carry all his stock in trade, though never could be the intention.

But the CHANCELLOR declared,

That as they were clearly within the letter, and that it was not certain what was intended, he would not recede from the words; there is a certainty on one side, and an uncertainty on the other; therefore it is safest to follow the letter, within which they are.

So decreed for the wife.

But on appeal to the House of Lords, this decree was reversed.

In the case of *Clerke* v. *Jackson* the whole question seems to have been whether or not the exception in the settlement as to household goods, would apply to and include goods which were clearly not within the spirit of such exception; the ultimate decision in effect being that stock in trade was not comprehended under the words "household goods, &c." Except for the exception the widow would not have been entitled to anything; because, whenever by an ante nuptial settlement a gross sum is given to the wife in lieu of the provision which the law gives her, it will be sufficient to exclude her, as well from her distributive part under the statute as from dower: *Blandy* v. *Widmore*, 1 P. Wms. 324; *Lee* v. *Cox*, 3 Atk. 419; *Barret* v. *Beckford*, 1 Ves. 519; *Garthshore* v. *Chalie*, 10 Ves. 1; *Hamilton* v. *Jackson*, 2 J. & Lat. 295. The result of these authorities may be stated to decide, in the words of Sir *Lancelot Shadwell*, in *Lang* v. *Lang*, 8 Sim. 465, that "where the husband has bound himself to fulfil some obligation by the payment of money, or by doing

an act equivalent to the payment of money, at the time of his death (whether it be at the time of his death or within six months after makes no difference); that obligation is satisfied if by dying intestate he allows the law to confer a benefit on the covenantee equivalent to that which he had bound himself to confer." But that reasoning is inapplicable to the case where the covenant on the part of the husband is to assure a sum in his lifetime for his wife's benefit: see *Lang* v. *Lang*, 8 Sim. 451; or to cases where the covenantor is to leave an annuity only; *Couch* v. *Stratton*, 4 Ves. 391; *Salisbury* v. *Salisbury*, 6 Hare, 526; or to cases where the provision for the wife is made by will, and there has been a partial intestacy, as she will not thereby be prevented from participating in any benefit which may accrue by such partial intestacy. Thus, where a testator, a freeman of London, after giving certain portions of his real and personal estate to his wife, declared that the provision he had thereby made for his said wife was and should be in bar, full satisfaction, and recompence of all dower or thirds which his said wife could have or claim in, out of, or to all or any part of his real or personal estate or either of them, died intestate as to other portions of his estate, it was held that she was entitled to her distributive share: *Pickering* v. *Lord Stamford*, 3 Ves. 332. In *Norcott* v. *Gordon*, 14 Sim. 258, the same principle was again recognised; see also *Wood* v. *Wood*, 7 Beav. 183. The reason of the distinction is, that in the former case the widow is supposed to have contracted with her husband (when it was competent for her so to do) to accept of an equivalent for all her possible rights as against his estate, and this contract would of course remain unaffected by his dying intestate or not: but where she derives a similar benefit under the will of her husband, and there is a partial lapse under his will, the same reasoning is inapplicable; for although he may have expressed it that she should take the benefits under his will in lieu of all other claims she might have got, he cannot be presumed to have anticipated the consequences of the lapse, under which she has an equal right to her proportion as the other next of kin.

All the above decisions were in cases of intestacy, or partial intestacy. In cases of testacy, however, the rule of construction has been, for the most part, the other way: *Haynes* v. *Mico*, 1 Bro. C. C. 129; *Devese* v. *Pontet*, 1 Cox, 188; but even in such cases where it is sought to establish a case of satisfaction there must be some definite expression, or something amounting to a necessary inference of such intention in the will, which is to operate against and in substitution of any rights which the wife may take aliunde: *French* v. *Davies*, 2 Ves. jun. 572. In the recent case of *Ellis* v. *Lewis*, 3 Hare, 310, although a provision was by

will made out of the whole estate, real and personal, of a husband for his surviving wife; and his real estate was subsequently conveyed to trustees for sale upon certain other trusts, as well as upon trust for securing the provision for his wife; it was held that the real estates were subject to dower, that the trust for sale was of all the testator's lands, minus the burdens affecting them, and that dower was as much a charge as any other incumbrance of the husband's own creation: see also *Harrison* v. *Harrison*, 1 Keen, 765; *Holdich* v. *Holdich*, 2 Y. & C. C. C. 18.

Where, however, the husband gave all his real and personal estates to be equally divided between his wife and two children, and declared that in the event of the children dying in the lifetime of the wife she should enjoy their shares during her life, Sir *W. Grant* held that the widow was not entitled to dower out of her children's shares of the realty, observing that "the claim of dower being directly inconsistent with the disposition of the will, the testator directing all his real and personal estate to be equally divided, &c., the same equality is intended to take place in the division of the real as of the personal estate; which cannot be, if the widow first takes out of it her dower, and then a third of the remaining two thirds": *Chalmers* v. *Storil*, 2 Ves. & Bea. 222. And in the late case of *Taylor* v. *Taylor*, 1 Y. & C. C. C. 727, a necessary inference to exclude the widow from enjoying both her free-bench and the benefits under the will was raised from the will itself: see also *Wathen* v. *Smith*, 4 Mad. 325; *Hall* v. *Hill*, 1 Dr. & War. 94; *O'Hara* v. *Chaine*, 1 J. & Lat. 662.

WEBBER *v.* TAYLOR.

Nov. 15, 1725.

Modus *to pay a sum of money, but if in another person's hands, money or tithe in kind; ill.*

BILL was brought to establish a *modus*, which was laid thus: for payment of such a sum of money, but if in the hands of any other person, to pay tithe in kind, or the money, at the election of the parson.

Modus *not to be established without trial, if desired.*

* LORD CHANCELLOR.—Will never establish a *modus* against a parson, without a trial at law, if he desires it; but this *modus* is clearly ill, for a *modus* cannot be desultory. [* 53]

A modus in lieu of tithes in kind, to be valid, must be shown to have been immemorially paid; *i. e.*, to have had its origin at least before the time of Richard the Second. It is a recompence to the parson in lieu of tithes, the immemorial non-payment of which, in kind, was a sufficient defence against a claim for tithes, upon the ground that such prescription is held to be proof of a grant or arrangement about property, which the parties were competent to enter into: it must be certain to a common and reasonable intent: *Hardcastle* v. *Smithson*, 3 Atk. 245. And though it is not necessary that a modus should have been constantly paid, yet a modus must, when paid, have been constantly paid in the same manner; *Chapman* v. *Monson*, 2 P. Wms. 573; otherwise it becomes a desultory, or dancing or leaping modus: *Webber* v. *Taylor*: but it is no objection to the modus that it may vary with the thing for which it is to be paid. On this principle a modus of a fixed amount for all ancient pasture-land, payable by those who hold lands within, but who happen to reside out of, the parish, is good: *Byron* v. *Cooper*, 11 Cl. & Fin. 556.

By the 2 & 3 Will. 4, c. 100, the time requisite for a valid prescription is reduced to thirty years, and no proof is now necessary of any legal origin of such exemption: *Salkeld* v. *Johnston*, 1 Mac. & Gor. 242.

BLACKLOCK *v.* BARNES.

Nov. 17, 1725.

If mortgagee lets the estate, that shall be always supposed the value, unless he shows otherwise.

IF the mortgagor makes proof that the estate was let at such a price, while in the hands of the mortgagee, that

shall be deemed the rate at which it was let the whole time, unless he shows the contrary, which is in his power, as being let by him.

See notes to *Harnard* v. *Webster*, next case.

HARNARD *v.* WEBSTER.

Trustee to be only charged for actual receipts; mortgagee for what he had or might have received.

TRUSTEE, though he acts, not to be charged as a mortgagee for what he had or might have received, but only for his actual receipts; for he might have moved for a receiver.

Where a mortgagee has entered into the possession of the mortgaged premises, the general rule is that he shall be charged with a fair occupation rent, and that he will not be chargeable with any more than the rent reserved, unless proof can be brought, which lies upon the opposite side, that he has acted fraudulently, or that he was guilty of wilful default: *Metcalf* v. *Campion*, 1 Moll. 238: nor will the fact of the estate being subsequently let by a receiver, at a higher rent, be sufficient to charge the mortgagee with the difference: *Hughes* v. *Williams*, 12 Ves. 493.

The principle on which the account is to be taken between mortgagor and mortgagee in possession seems to be, that, where the latter has entered into possession when the interest was in arrear, and the rents have exceeded the annual interest, the aggregate amount of his receipts on the one hand will be set off against the total sum due to him in respect of his principal, interest, and costs, on the other, at the period of redemption; *Finch* v. *Brown*, 3 Beav. 70; *Horlock* v. *Smith*, 1 Coll. 287; but if he enters into possession when there is no arrear of interest, and the rent exceeds the annual amount due in respect of interest, there the Court

will direct annual rests: *Wilson* v. *Cluer*, 3 Beav. 136, and 4 Beav. 214. If the mortgagee remains in possession after his principal and interest are discharged, he will be subject to pay interest on the balance with annual rests: *Lloyd* v. *Jones*, 12 Sim. 491.

It is sometimes a question, as to whether a mortgagee is entitled to charge anything for improvements. On this point Lord *Langdale* has observed, that "several cases have occurred at different times, showing what he ought and, to some considerable extent, what he ought not to do. Such repairs as are necessary for the support of the property he will be allowed for. He will not only be allowed for repairs, but he will also be allowed for doing that which is essential for the protection of the title of the mortgagor;" and an inquiry as to lasting improvements was directed: *Sandon* v. *Hooper*, 6 Beav. 246.

Generally speaking, unless a case of fraud is proved against a trustee, his liability to be charged will not extend beyond his actual receipts; "You cannot affect the trustees," says Lord *Thurlow*, "with more than they actually received, without wilful default they are mere stakeholders:" *Pybus* v. *Smith*, 1 Ves. jun. 189, 193. So, where a purchaser has been evicted from lands by a title paramount, he is regarded as a trustee for the rightful owner, but will only be charged with his actual receipts: *Howell* v. *Howell*, 2 Myl. & Cr. 478: nor will an inquiry be directed as to what he might without wilful default have received, unless a special case is made by the bill for such inquiry; *Shepherd* v. *Towgood*, Turn. & R. 379; *Turner* v. *Corney*, 5 Beav. 515; *Pelham* v. *Hilder*, 1 Y. & C.C.C. 4; *Berrow* v. *Morris*, 10 Beav. 437; but in the case of a mortgagee in possession, such an inquiry is an usual one: *Hughes* v. *Williams*, 12 Ves. 493: so also in the case of an elegit creditor in possession: *M'Donnell* v. *Walshe*, 2 Dr. & War. 252; *O'Brien* v. *Mahon*, 2 Dr. & War. 306.

With respect to the liabilities of a trustee, the observations of Lord *Hardwicke* in the case of *Ex parte Belchier*, 1 Amb. 219, are very valuable, he there says; "Courts of law, and equity too, are more strict as to executors and administrators; but where trustees act by other hands, either from necessity or conformable to the common usage of mankind, they are not answerable for losses. There are two sorts of necessities: 1st, Legal necessity; 2nd, Moral necessity. As to the first, a distinction prevails where two executors join in giving a discharge for money, and one of them only receives it; they are both answerable for it, because there is no necessity for both to join in the discharge, the receipt of either being sufficient; but if trustees join in giving a discharge, and one only receives, the other is not answerable, because his joining in the discharge was necessary. 2nd, Moral necessity, from the

usage of mankind: if trustee acts as prudently for the trust as for herself, and according to the usage of business: if trustee appoints rents to be paid to a banker at that time in credit, and the banker afterwards breaks, the trustee is not answerable."

It may be inferred from the case of *Harnard* v. *Webster* that a legal mortgagee cannot under any circumstances move for a receiver, and the reason is that he himself is at liberty to take possession, if he pleases: *Berney* v. *Sewell*, 1 J. & W. 647; *Leith* v. *Irvine*, 1 Myl. & K. 277: *Sturch* v. *Young*, 5 Beav. 557; see however *Davis* v. *Dendy*, 3 Mad. 172, where the nature of the mortgaged estate was such, (consisting of several small houses,) that great time and trouble must have been sacrificed in the receipt of the rents, and a receiver was appointed; but the Court must be satisfied that the property is of such a nature that a prudent owner of the estate, whose time is of value to him, would probably have thought it right to appoint a receiver.

PAXTON.

Particular charge must be answered, and not generally which includes that particular.

IF a man gives a general answer, and a particular question be asked which is included in the general; yet he must answer it particularly, else it may be demurred to, for that may be a matter of judgment. A man is not obliged to answer any question which may subject him to a penalty; any thing else material he must.

Dolosus versatur in generalibus,— unless therefore the answer contains a clear and sufficient statement, which to a reasonable extent meets the whole case, it will be deemed evasive. A general denial in the answer to a specific charge has always been held insufficient: *Prout* v. *Underwood*, 2 Cox, 135; *Hepburn* v. *Durand*, 1 Bro. C. C. 503; *Wharton* v. *Wharton*, 1 Sim. & St. 235. Sir *James Wigram* has concisely explained the rule on this subject, in the case of *Tipping* v.

Clarke, 2 Hare, 388. "If the defendant will simply answer in the terms of the bill, he avoids all difficulty on the subject; but if, instead of doing so, he gives an answer which is not precise with reference to all the matters on which he is interrogated, and then endeavours to shelter himself under a general denial, coupled with the words 'except as aforesaid,' or similar expressions, he makes it often difficult to decide whether the answer is sufficient or not. The rule, since I have known the practice of the Court, has been, that wherever the defendant denies the bill to be true, 'except as aforesaid,' or 'except as appears by the other parts of the answer,' if there be not found on the answer a clear and sufficient statement, which to a reasonable extent meets the whole case, the answer is deemed to be evasive."

HUET *v.* LORD SAY AND SEAL.

Devisee cannot revive, but must bring an original bill in nature of a bill of revivor.

BILL of partition brought by several persons, one dies, who devises his part to a co-plaintiff, and makes him executor; he brings a bill of revivor, to which it was demurred.

Said that bills of revivor, and bills in nature of bills of revivor are very different: a bill of revivor can only be by the heir, as to the realty, and by an executor, or administrator, as to the personalty; on bill of revivor the estate continues the same as before abatement, but here, in case of a devisee who is a purchaser, the estate is altered, *and a purchaser can never revive; 1 Ch. Ca. 174. And an answer must be put in, and publication pass, though possibly may have benefit of orders, &c. [* 54]

Demurrer allowed.

But leave given to amend the bill, and revive as executor; and an original bill, in nature of a bill of revivor as devisee, was thought the most proper method.

A devisee, not being in representation to the devisor, but in the nature of a purchaser, cannot bring a bill of revivor: *Backhouse* v. *Middleton*, 1 Ch. Ca. 174; see Mitf. Pl. 4th ed. 71. "The reasons why regularly a devisee or assignee of a sole plaintiff cannot bring a bill of revivor are, 1st, because a suit hath been looked upon as a chose in action, and consequently not assignable for fear of maintenance; 2ndly, and which seems the better reason, because where the party devises or assigns his interest and dies, if the devisee or assignee were to bring his bill of revivor against the defendant, the heir or executor would be pretermitted, who might have a right to contest such disposition; and therefore he must bring his original bill and make the heir or executor party;" 1 Eq. Ca. Abr. 2; but there can be no new defence: *Clare* v. *Wordell*, 2 Vern. 548.

So, where a bill is filed asking for relief against a given individual and he dies, and by an act of his own, as by a devise, his interest in the estate which is the subject of the suit is transmitted to other persons, those other persons must be made parties to the suit by means of a bill, which with respect to them is an original bill; but which, with respect to the original bill, is a bill of supplement: *Woods* v. *Woods*, 10 Sim. 197, 213.

YATES *v.* COMPTON.

Nov. 19, 1725.

Devise to executors to sell, who renounce, executors need not be made parties.

DEVISE made to executors to sell, and the money thence arising to purchase an annuity for B., the executors renounce; bill is brought against the heir at law, to which the executors are not made parties, which was made an objection; but it was answered, the estate descends to the heir at law, and he is only a trustee to the use of the will, since the executors renounce; so no occasion to be parties: and so was it held.

Where the power is given to the executors, quà executors, and not to them as individuals, there unquestionably their renunciation of the office will also denude them of their power (*Keates* v. *Burton*, 14 Ves. 434), and dispense with the necessity for their presence in a suit where the inheritance is concerned: *Yates* v. *Compton*, *S. C.* 2 P. Wms. 808: it is however clear that the power may have been conferred independent of the office, and may survive the renunciation of the executorial duties: *Graydon* v. *Hicks*, 2 Atk. 19; 2 Sugd. on Powers, 6th ed. 538; and see *Ford* v. *Ruxton*, 1 Coll. 403.

Where lands are devised to executors to sell, they will acquire an interest in the lands; but there has been a long recognised distinction between a devise of lands to executors to sell and a devise that executors shall sell; in the latter case, where the devise is merely that the executors shall sell, they do not take the legal estate, a power only is given: Lit. sect. 169; 1 Sugd. on Powers, 6th ed. 128; *Doe* v. *Shotter*, 8 Ad. & E. 905; *Allum* v. *Fryer*, 3 Q. B. 442.

THORN *v.* PITT

De Term. Sanct. Hill., Feb. 9, 1725.

Ante, p. 21. *Cannot revive for costs, though taxed.*

BILL was dismissed with costs, which were taxed; bill of revivor was brought singly for costs, to which it was demurred; in arguing the demurrer, that though the constant rule be, that where a bill is dismissed with costs, cannot revive for that, that must be taken to be where they are not taxed, and liquidated to a * sum certain, for then it becomes a duty; and though the bill be dismissed, it is not so much out of the Court, but the party, in consequence of such dismissal, is liable to the process of the Court by subpœna, attachment, &c.

[* 55]

CHANCELLOR.—It is a rule that, unless in account, where both parties are actors, cannot revive; I know no instance, where revivor in such a case as this; it is very odd, but the rules of the Court must be observed.

Demurrer allowed.

The case of *Thorn* v. *Pitt* may now be considered as overruled. The general rule is as laid down in the 4th resolution, in *Christmas* v. *Christmas*, ante, p. 21, that if a party die before taxation of costs there can be no revivor. "No bill of revivor," says Chief Baron *Gilbert*, "can be brought where it relates to costs only, unless the costs are taxed and a report made in the lifetime of the party, for this is actio personalis et moritur cum personâ:" Gilb. For. Rom. 181. A distinction has prevailed between cases where the death has taken place before, and cases where it has taken place after taxation. "Where costs are taxed," says Lord *King*, "they become a judgment

debt, and as at law you may revive a judgment so you may here:" *Edgill* v. *Brown*, 1 Dick. 62. Lord *Hardwicke*, has said, "I always held this to be a hard rule and a very nice distinction; the right to costs is the same before taxation as after, only the quantum has not been ascertained:" *Kemp* v. *Mackrell*, 3 Atk. 812. The rule nevertheless is, that if *before the death of either party* the costs are not taxed, there can be no revivor: *Jupp* v. *Geering*, 5 Madd. 375; *Andrews* v. *Lockwood*, 15 Sim. 153; *Bowyer* v. *Beamish*, 2 J. & Lat. 228. And, as until taxation there can be no other process than revivor, the right to recover the costs becomes extinct with the person from whom they are recoverable; *White* v. *Hayward*, 2 Ves. 461; or to whom they are due, thus, a motion by the personal representative of a deceased defendant that the Master might be directed to proceed with the taxation of costs ordered to be paid by the plaintiff, was refused to be entertained by Sir *J. Wigram*: *Robertson* v. *Southgate*, 7 Hare, 109.

The rule however is subject to the following qualifications: 1st, Where by the decree they are payable out of a particular fund; *Lowten* v. *The Mayor, &c. of Colchester*, 2 Mer. 115; *Meredith* v. *Hughes*, 3 Y. & J. 189; or are decreed against an executor out of assets: in which case the representative character of the executor is distinguished from his personal character, and the right to pursue the assets is declared: *Blower* v. *Morrets*, 3 Atk. 772.

2nd, If there be anything remaining in the decree to be executed (or, in the words of the Chief Baron *Gilbert*, "If, by the decree, the party is to pay a sum of money, or if a duty is decreed, if he is to deliver over a bond, or deeds, or writings, or if anything is annexed to the decree besides costs, the suit may be revived:" Gilb. For. Rom. 181), the rigour of the rule will be relaxed; *Johnson* v. *Peck*, 2 Ves. 465; but it must be something material—something that, in order to avail himself of the part unperformed, the party must have revived: *Askew* v. *Townsend*, 2 Dick. 471; *Andrews* v. *Lockwood*, 2 Phill. 398. The taxation of costs is complete as soon as the Master has signed his report: 3 Dan. Ch. Pr. 198.

In the case of *Kemp* v. *Mackrell*, ubi supra, a cross bill had been dismissed with costs; but, before the costs were taxed or ascertained, the plaintiff died: it was held that the representatives of the defendant in the cross bill might revive for the costs against the representative of the deceased plaintiff.

RAKESTRAW *v.* BREWER.

De Term. Sanct. Trin., July 12, 1726.

[REHEARING.]

If mortgagor continues in possession of any part, shall redeem the whole.

A PERSON who had chambers in Gray's Inn mortgaged them in 1687, but continued the possession till 1700, at which time an order of the Bench was made, to deliver possession of the mortgaged premises to the mortgagee, into part of which he entered, but as to other part the mortgagor continued possession till 1708, at which time he died, (and then the mortgagee had possession of the whole,) leaving the plaintiff an infant, who came of age in 1714; in 1721, the mortgagee being a bencher, got eleven years added to his term by the society. Bill was brought to redeem in 1726, at which time mortgagee offered 20*l.* to be rid of the plaintiff's claim.

Decree was made at the Rolls to redeem, and also to have the renewed term conveyed on payment of the consideration-money, with interest from the time.

[* 56] * It was admitted, that where a mortgagee is in possession twenty years, and no interest paid, the mortgagor shall not be admitted to redeem; but where he is in possession of any part, the computation of that time shall never be admitted to affect him, but only from the time the mortgagee was in possession of the whole, and shall be admitted to redeem; and not only the mortgaged term, but also any renewed term shall go along with it; and this Court has gone so far, that if a trustee or mortgagee gets a new term, after the old one be actually expired, yet it shall be a trust;

for it is supposed to have proceeded from having had the original term; and though there be nothing in fact in having a tenant-right, yet as such regard is had to it in the estimation of the world, it will be looked on as the occasion of the lease.

This case was endeavoured to be differenced from those general rules, as this renewed term was granted as a favour on the foot of his being a Bencher, and not as mortgagee; and the plaintiff was utterly incapable of having it, since by the rules of the Society, none can have chambers but those who are members of the Inn.

Lord Chancellor affirmed the decree.

Nothing is more clear, or a more established rule, than that if the mortgagor is in possession of any part, he shall be admitted to redeem the whole; for part he may, as being in possession, and part he cannot separately, so shall the whole; if mortgagee be in possession twenty years, and no interest paid, there shall be no redemption allowed. In this case the mortgagor was in possession of part till 1708; from 1708 to 1714 the plaintiff was an infant, so that is accounted for; and from that time it does not amount to twenty years; then as to the renewed term, it has been always a rule, that such renewals are to be redeemed with the principal, as an excrescence out of it, and to go with it.

And though the plaintiff by the rules of the House is not capable of chambers, it shall be to him or his appointee.

This being a dispute concerning Gray's Inn, the Chancellor obliged them to show that the Benchers would not determine the matter, but had given leave to go to law; this regard was to be had to all the societies of law, that all their disputes may be terminated among themselves. Lord Keeper *Wright* refused to hear a cause of this nature, and sent it back to the Benchers. In the present case the Court determined the right, and ordered that the Benchers should settle what was due for principal, interest, and costs, and to take account of the several receipts and allowances.

The main principle to be deduced from the case of *Rakestraw* v. *Brewer* is, that where a mortgagor remains in occupation of any portion of the mortgaged premises, there the Statute of Limitations will not operate to bar his right of redeeming the other portion as to which the possession might have been sufficiently adverse to have excluded redemption. It has been long established that where there are several mortgages of distinct estates, belonging to the same mortgagor, in one mortgagee, the mortgagor cannot redeem one without redeeming all, even though they were given as securities for different debts: *Pope* v. *Onslow*, 2 Vern. 286; *Jones* v. *Smith*, 2 Ves. Jun. 372, see p. 376; *Collet* v. *Munden*, cited ib. p. 377; *Ex parte Alsager*, 2 M. D. & D. 328: and à fortiori he will not be permitted to redeem a portion only of one security. So also, by a parity of reasoning, is it held that a mortgagee cannot foreclose as to a portion of the security which has been mortgaged to him without foreclosing the whole, though the money advanced belongs to different persons, *Palmer* v. *The Earl of Carlisle*, 1 Sim. & St. 423; and all the mortgagees must be parties, *Davenport* v. *James*, 7 Hare, 249.

The second principle to be extracted from the case of *Rakestraw* v. *Brewer* is, that wherever a person in the relation of a trustee obtains a renewal of a lease or an extension of a benefit, which his cestui que trust might have obtained, such extension or renewal shall enure for the benefit of the person standing in the relation of cestui que trust: see post, *Keech* v. *Sandford*, p. 176, in notis. Thirdly, it may be inferred from the case of *Rakestraw* v. *Brewer*, that where chambers belonging to any of the Inns of Court are the subject of a mortgage, the proper course in the first instance, either with respect to foreclosure or redemption, is to apply to the Benchers of the particular Inn, as Courts of equity will not interfere unless the Benchers have declined to act.

[* 57]

* AT THE ROLLS.

Money left to trustees, who therewith purchase land, this shall go to the cestui que trust, having declared it done in pursuance of the trust.

A MAN makes his will, and appoints B. executor, and orders certain money to be laid out on land security, for the benefit of C. B. calls in money, and therewith purchases land, which he says was done in pursuance of the will; B.

dies, not leaving assets to pay his own debts; the land thus purchased shall be for the use of C.

Whatever doubts may have formerly existed as to following money which has been invested in land on the ground that money has no earmark, it cannot now be questioned that even by parol evidence it may be followed into land and affected with a trust in favour of the party for whom it may have been destined, or from whom it may have been abstracted: *Deg* v. *Deg*, 2 P. Wms. 414; *Lane* v. *Dighton*, Amb. 409. Where inability in the purchaser to buy the land out of his own funds is the sole ground upon which the money is sought to be followed into the land, such inability must be shown by evidence of facts from which the strongest conclusion can be drawn: *Lench* v. *Lench*, 10 Ves. 511; *Wilkins* v. *Stevens*, 1 Y. & C. C. C. 431.

GRENON *v.* RAWSON.

Oct. 19, 1726.

Deed-poll is made for an annuity, and after charges his estate for the payment of it, he shall have security, and not restrain the deed-poll.

A MAN makes a deed-poll for the payment of an annuity of 15*l.* per annum; and after by his will subjects all his real and personal estate to the payment of it; grantee brings bill for the arrears, and to have part of the estate set out for security for the payment of it; to which it was demurred, and the demurrer overruled; and decreed payment of the arrears with costs, and that the Master should settle the security for the future payment of it.

Mr. *Mead* in this case said it was frequently done; and cited Mr. *Trevor's* case, where a bond of the penalty of 5000*l.* was given for the performance of the marriage contract; there it was insisted, they should abide by the penalty; but the Court was of another opinion, and decreed the completion of the agreement; for the bond was not given as a satisfaction for that, but as a further security to enforce it.

It would be a serious perversion of equity to deprive a man of his original remedy in the event of his accepting a more extended one by a different instrument, or by his having recourse to his general rights independent of his particular security. Thus it is apprehended, though there is no absolute decision on the point, that a mortgagee may sustain a suit against the executors of a mortgagor for sale of the property comprised in the security, and for payment of any deficiency out of the general estate of the testator: *King* v. *Smith*, 2 Hare, 239; *Skey* v. *Bennett*, 2 Y. & C. C. C. 405. "Nothing," observed Sir *E. Sugden*, "could be more alarming to creditors than that a doubt should be thrown out whether, by taking a new security for their old debt and for further advances, they do not prejudice their original securities:" *Tenison* v. *Sweeny*, 1 J. & Lat. 717.

Where however a plaintiff in equity filed his bill to restrain a defendant from breaking an agreement, and at the same time proceeded with his action at law to recover the stipulated damages for the breach of the agreement, the Lord Chancellor held, that after verdict for the plaintiff, it was not competent for him to obtain an injunction, for in such a case a Court of equity considers that the defendant has paid the price of doing the act which it is called upon to restrain: *Sainter* v. *Ferguson*, 1 Mac. & Gor. 286.

BLACKWAY *v.* THE EARL OF STRAFFORD, ADMINISTRATOR CUM TESTAMENTO ANNEXO OF JOHNSON.

Will made for the payment of debts, those barred by the Statute of Limitations shall be paid.

SIR HENRY JOHNSON owed the plaintiff a simple-contract debt in the year 1696. In 1719, at which time he owed several other debts, he made his will, and appointed all his just debts should be paid out of his personal estate, and by sale of part of his real estate. The defendant, the Earl of Strafford, takes out administration cum testamento annexo; the plaintiff brings his bill for the payment of this debt, to which the defendant pleads the Statute of Limitations.

* It was insisted, that the plea was good, for that the law extinguishes the debt; after six years the remedy is gone; and a right without a remedy is an absurdity; there can be no reason to suppose, that when he orders all his debts to be paid, that he meant to call those debts which the law does not call so. Had there been no other debt but this nominal one, or had it been particularly named, then these words might have compelled the payment of it; because the words of the will could not else be satisfied; but here they may. [* 58]

E contra. The debt is not extinguished by the Statute of Limitations; and if a trust be created, it sets it up again; this has been looked on as the constant justice of this Court: Salk. 154. Though the remedy be gone, the duty remains, and this admits of a plain proof; if six years incur, a promise after will make him liable, which proves that the debt is not gone, but only the remedy; for if it were, there would be no consideration for the promise, and it would be nudum pactum: besides, in other cases it is no new thing, that there should be a right without a remedy; if an infant contracts a debt, (not for necessaries,) if he promises after he comes of age, that will make him liable. There was a case before Lord *Cowper* of *Stagers* v. *Welby*, in which it was decreed, that a debt barred by the statute should be paid, he having by will ordered all his debts to be paid.

Lord Chancellor.—The statute is not an extinguishment of the debt, it is subsisting in conscience, else it could not be set up by a promise; if there be a promise, it is not as a new one, but a re-continuance of the old; it is true, as to the manner of payment, that cannot be altered by his will; bond-debts will be first paid; and if in such a case as this, (without charging the real estate,) if there had been a residue after payment of debts not barred by the statute, these would have a right to be paid after those which were not barred. I have no difficulty, but you may look into the case of *Stagers* v. *Welby*, where you say it was pleaded. And after, on examining that case, it was found so to be.

Vide *Coppin* v. *Coppin*, 28.

The equitable recognition of debts once legally extinct is a doctrine which, though much canvassed in the older authorities, is now clearly defined. Where by the will of a testator there is a provision for the payment of his debts generally, there, unless there be either a specific or an implied recognition of the very debt which it is sought to revive, the plea of the Statute of Limitations is a good bar to any claim which has been barred by the provisions of that statute in the lifetime of the testator. If we are not warranted in assuming this position inferentially from the reversal of the judgment of Lord *King*, in the case of *Earl of Strafford* v. *Blakeway*, 6 Bro. P. C. 630, Toml. ed., we are justified in so stating the law as deducible from the later authorities and corroborated by the most recent decisions.

The leading modern authority on the subject is that of *Burke* v. *Jones*, 2 Ves. & Bea. 275, where all the previous cases are ably reviewed by Sir *Thomas Plumer*, and the doctrine which attributes to a trust for payment of debts the effect of reviving such demands as have been once barred is characterized as "standing upon an unnatural conjecture as to the intention, pregnant with danger and injury by inviting stale demands and discouraging provisions for the payment of debts;" Ib. p. 290. The current of authority since *Burke* v. *Jones* has been uniform, and in accordance with the principles there laid down. In that case the debt had been barred by the statute before the testator's death.

Where the bar of the statute is not complete at the time of the testator's decease, a very important distinction exists between devises of realty for the payment of debts and bequests of personalty for the same purpose: thus, where lands are devised upon trust for payment of debts, the statute does not run after the death of the testator: *Fergus* v. *Gore*, 1 Sch. & Lef. 107. Where, however, there is a similar trust of personalty the progress of the statutable bar is not arrested, "because it does not at all vary the legal liability of the parties, or make any difference with respect to the effect and operation of the statute itself:" *Scott* v. *Jones*, 4 Cl. & Fin. 382, 397; *Evans* v. *Tweedy*, 1 Beav. 55; *Freake* v. *Cranefeldt*, 3 M. & C. 499. In the last case Lord *Cottenham* observed, "It would be absurd to hold, that if the debtor died only a day before the six years were out, the creditor was then to have another period of six years within which to enforce his demand:" Ib. p. 502. Nor will the period which intervenes between the death of the debtor and the time when representation to him is taken out be excluded from the operation of the statute, provided the statute had commenced to run in his lifetime: Ib.; and see *Rhodes* v. *Smethurst*, 4 M. & W. 42. But where the claim was in respect of a bill of exchange, accepted by the defend

ant, but not due until after the death of the payee, in an action brought by his administrator more than six years after his death, but soon after administration was taken out, it was held that the period of the commencement of the statute's operation must be referred to the time when the cause of action first accrued, viz., the date of the grant of the administration; for a cause of action cannot be said to exist unless there be a person in existence capable of suing; *Murray* v. *The East India Company*, 5 B. & A. 204; and this reasoning has been extended and made applicable to the case where representation had not been taken out for more than six years after the cause of action had first accrued (but within six years after probate was taken out in loco fori), although the statute had commenced to run in the lifetime of the creditor: *Fergusson* v. *Fyffe*, 8 Cl. & Fin. 121. Upon an analogous principle, where a claim was to have been enforced by a public functionary within a certain definite period, the time during which the office was in abeyance was excluded: *Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen*, 2 Moo. Ind. App. 390.

Nothing but the express recognition by a testator of a simple, contract debt once barred will have the effect of reviving it after his decease, so as to oust the operation of the Statute of Limitations. Such express recognition renders it valid; because the existence of the debt, though there exists a statutory bar to its recovery, is a sufficient consideration for a new promise: the testator is not to be bound beyond the extent which he chooses to specify, for he must be permitted to be the measurer of his own bounty; see *Williamson* v. *Naylor*, 3 Y. & C. 208; and the creditor can claim nothing more than the promise gives him: *Philips* v. *Philips*, 3 Hare, 281.

It must be borne in mind, that the Statute of Limitations, with which *Blackway* v. *Strafford* is concerned (21 James I. c. 16), does not, as the recent statute 3 & 4 Will. IV. c. 27, discharge or extinguish the debt; they both bar the remedy by action; but by the latter statute, where the remedy is barred, the right and title of the real owner are also extinguished: *The Incorporated Society in Dublin for promoting English Protestant Schools in Ireland* v. *Richards*, 1 Dru. & War. 258. Upon a principle analogous with the above-mentioned distinction in the statute of James it is that a lien in respect of a debt is not destroyed though the remedy by action is abolished: *Spears* v. *Hartly*, 3 Esp. 81; *Higgins* v. *Scott*, 2 B. & Ad. 413. This equitable doctrine was lately recognised by Sir *James Wigram*, in permitting an executor to set off a debt due from a legatee to his testator, which debt had been barred by statute at the time of testator's death against a legacy bequeathed to such debtor: *Cour-*

tenay v. *Williams*, 3 Hare, 539. We have seen that a written direction in a will to pay debts generally would not have availed a creditor so as to have excluded the operation of the Statute of Limitations: *Burke* v. *Jones*, 2 V. & B. 275: but, until 9 Geo. IV. c. 14, it was quite competent for the creditor to have proved a verbal admission of his debt at any time within six years of bringing his action. By this statute of 9 Geo. IV. the promise or acknowledgment must be in writing to be signed by the party chargeable thereby.

It would seem that an acknowledgment by a bankrupt of a debt in his schedule would not be such an acknowledgment as to take the case out of the statute, for it is a compulsory process; the object of the statute being not to charge the party, but to discharge him and distribute his assets: *Courtenay* v. *Williams*, 3 Hare, 539; aliter, as to an insolvent's schedule, *Barton* v. *Tattersall*, 1 Russ. & M. 237.

An acknowledgment made by an administrator, in the inventory furnished by him to the Ecclesiastical Court on the citation of a third party, is sufficient to take the debt therein specified out of the Statute of Limitations: *Smith* v. *Poole*, 12 Sim. 17. It has been decided that the term "debts" would include all obligations, whether by specialty or simple contract, present or contingent, whether ascertained or sounding in damages, unliquidated at the date of the testator's death; *Bermingham* v. *Burke*, 2 J. & Lat. 699; *Morse* v. *Tucker*, 5 Hare, 79; though the latter (damages) are not a debt within the statute of 3 W. & M. c. 14; *Wilson* v. *Knubley*, 7 East, 128.

* BELL *v.* SPEREMAN. [* 59]

De Term. Sanct. Mich. October 24, 1726.

[MOTIONS.]

Receiver commits waste, and discharged by all parties concerned in interest; attachment will not go for so doing.

A., AT the instance of all parties concerned, was by the Court appointed receiver; after, in the midst of vacation, he commits waste; all parties concerned serve him with a paper, discharging him from being receiver on that account; motion for attachment for turning him out, who was appointed receiver by the Court.

CHANCELLOR.—Though the general proposition may be true, that attachment is to go where a person appointed receiver by the Court is turned out; but it may be otherwise when attended with these circumstances. So denied the motion.

As a general rule, where a receiver has been appointed the Court will not allow his possession to be interfered with by any party, whether claiming by a title paramount or under the right which the receiver was appointed to protect, unless such claimant apply for and obtain the leave of the Court before the institution of any legal proceedings affecting the possession which the receiver had acquired; for when appointed he is regarded as the officer and representative of the Court, and subject only to its orders: *Angel* v. *Smith*, 9 Ves. 335; *Evelyn* v. *Lewis*, 3 Hare, 472. Where a receiver has been guilty of any gross neglect or misconduct in the discharge of his duty, the Court on motion grounded on a proper affidavit will award an attachment and remove him: Smith's Duty and Office of a Receiver, p. 208.

TEASDALE *v.* TEASDALE.

Oct. 26, 1726.

Father, supposing his son tenant in fee, stands by and lets his son make a settlement, which he had not power of doing according to his real title; yet shall make good the settlement.

A SON who was only tenant for life, though by the father looked on to be tenant in fee, makes a settlement on his intended wife for her jointure, (in which was a covenant,) with the knowledge and consent of his father, who was a witness to the deed; he saluted and wished the intended bride joy: the marriage was had; the son dies, and makes his wife executrix, leaving a personal estate of the value of 3000*l.* The father, after the decease of the son, discovers that the son was only tenant for life, and that the fee was in himself; on which title he had verdict, and judgment at law. The wife of the son brings bill to be relieved.

[* 60] * For the plaintiff it was said, that a multitude of cases have been adjudged, that where a party is privy to the transaction, he shall take no advantage of it; for it is a fraud, and would be doing an innocent person an injury; 1 Vern. 136, *Hobbs* v. *Norton*; and in Lord *Macclesfield's* time, *Watts* v. *Creswill*, a purchaser relieved against a mortgagee who appeared to be privy to the purchase, though he was an infant.

1 Vern. 136.

Watts v. *Creswell.*

E contra, it was insisted, that this case was very different from the cases cited; for there they appear to have been cognizant of their titles, and concealed them, but here he did not know of his title, and therefore cannot be said to conceal it; and further in this case it appears, that the father had another estate, which he knew he had in fee,

for the settling of which he had an adequate consideration; so extremely plain he would have so done in respect of this, had he known his own title.

Lord Chancellor.—I shall make no difference, whether he knew of his title or not at that time, considering the near relation of father and son; it is plain, it was thought the son had the fee; and had it been known it was in the father, it would have been insisted on that he should have joined, else the marriage would not have been had; as he knew of the settlement, he shall not take advantage against it.

Then it was insisted, that she should be obliged to have recourse to the covenant against the personal estate; and that it would be very hard to make a person suffer for ignorance of his title, when she may have ample satisfaction against the personal estate; whereby equal justice will be done, and she will have the fruit of her agreement.

But the Chancellor said he would complete her jointure, for that was what was intended to be had, and would not oblige her to have recourse to the covenant.

N.B. By the settlement the husband was made tenant for life, and the wife tenant in tail, which the Court would not decree, but ordered an usual jointure to be made on her; viz., an estate for life, impeachable of waste.

It is a fundamental principle in equity that wherever a party having a title to an estate, and, knowing it, stands by and either encourages or does not forbid the purchase, he shall be bound by it: *Dyer* v. *Dyer*, 2 Ch. Ca. 108; Fonbl. Eq. book 1, c. 3, s. 4. The case of *Teasdale* v. *Teasdale* has extended this doctrine a step further, in deciding that the ignorance of the party's title will not alter his liability, or exempt him from the consequences of his innocent misrepresentations.

It must be borne in mind that in the case of *Teasdale* v. *Teasdale*, the contract of the wife, having been entered into before marriage, was for valuable consideration, and being, therefore, a purchase for value, the case falls within the maxim that, where one of two innocent persons must suffer, he, who by the exercise

of a greater degree of caution might have averted the loss, shall bear it: see *Pakenham* v. *Bland*, ante, page 42. in notis, p. 118.

On this principle the case of *Hobbs* v. *Norton*, 1 Vern. 136, was decided. There Sir George Norton's younger brother, having an annuity of 100*l.* per annum charged on lands by his father's will, contracted with Mr. Hobbs for selling to him this annuity. Mr. Hobbs went to Sir George Norton and told him he was about to buy this annuity of his younger brother, and desired to know of him if his younger brother had a good title to it, and whether his father was seised in fee at the time of the making the will, and whether the will was ever revoked; Sir George told him he believed his brother had a good title to it, and that he had paid him this annuity twenty years, but withal told him, that he heard there was a settlement made of his father's lands before the will; and that the said settlement was in Sir Timothy Baldwin's hands, and that he had never seen it, and therefore could not tell him what the contents of it were, but encouraged him to proceed in his purchase, telling him he had not only paid his brother his annuity to that time, but had paid to his sisters 3000*l.* under the same will. Afterwards Sir George Norton got this settlement into his hands, and the lands being thereby entailed, endeavoured to avoid the annuity. Hobbs's bill was to have this annuity decreed, or re-payment of his purchase-money. The Lord Keeper decreed the payment of the annuity purely on the encouragement Sir George gave Hobbs to proceed in his purchase, and observed that it was a negligent thing in him not to inform himself of his own title, that thereby he might have informed the purchaser of it when he came to inquire of him; and therefore decreed Sir George to confirm the annuity to Hobbs. So where, upon the treaty for a mortgage of an estate, a person who was entitled to be recouped out of the estate in case a certain incumbrance was levied out of his own, was in communication with the mortgagee upon the subject of the mortgage, but did not inform him of his equitable claim, Sir *E. Sugden* held that his silence amounted to a disclaimer of any interest in the property about to be mortgaged: *Boyd* v. *Belton*, 1 J. & Lat. 730. See also *Mangles* v. *Dixon*, 1 Mac. & Gor. 437. The principle has been carried further in the case of *Govett* v. *Richmond*, 7 Sim. 1, than in any other case: there Sir *L. Shadwell* held that where a party had a claim on property which he knew to be the subject of a reference to arbitration between two other parties, and who had suffered the award to be made without bringing forward his claim, he was concluded by the award.

LETHULIER *v.* CASTLEMAIN.

Oct. 27, 1726.

On bill for a trial at law for the bounds of a manor, each side must give notes of the bounds they claim; and if jury find different, to be indorsed on the postea.

BILL brought to have trial at law for the bounds of a manor.

* Mr. *Talbot* informed the Court, that in the case of the Bishop of Durham, which was parallel to this, it was ordered, that each side should give a note to the other of what each claimed as their bounds; and if the jury find bounds different from the note given by either side, that those different boundaries should be indorsed on the postea: and so it was ordered here; only it being a trial at bar, it was to be indorsed on the habeas corpus. [* 61]

Same order made Nov. 4, 1726, between *Hughes* v. *Grames.*

The later authorities indicate that the general course is for the Court to direct a commission to issue, to inquire and ascertain the several lands whose boundaries are confused, though it must be borne in mind, that the mere circumstance of the boundaries being confused furnishes per se no ground for the interposition of a Court of equity: *Speer* v. *Crawter*, 2 Mer. 418; *Wake* v. *Conyers*, 2 Cox, 360; *S. C.* 1 Eden, 331. A Court of equity must be satisfied that the plaintiff has a title to some of the lands in defendant's possession, and that he cannot proceed by ejectment (*Godfrey* v. *Littel*, 1 Russ. & M. 59), and that the confusion has not arisen from his own conduct or the conduct of those through whom he claims: *Miller* v. *Warmington*, 1 J. & W. 484.

ROBINSON *v.* SAVILE.

Oct. 28, 1726.

Person mortgaged a copyhold estate for the payment of debts, and after devises his estate for payment of debts, interest was paid after his decease; foreclosure decreed.

A PERSON mortgaged his copyhold estate; after he makes his will, and devises his estate for payment of debts; the interest of the mortgage was paid after his decease. Bill brought for a foreclosure.

LORD CHANCELLOR.—Though a devise of a copyhold is void at law, without a surrender to the use of his will, it will pass in equity, if it be for payment of debts; but that is if no third person be injured; but if there be assets, they shall be first applied; and here by the payment of interest, it is an admission there are assets; and therefore decreed a foreclosure.

By the 55 Geo. III. c. 192, every disposition of copyhold tenements, made by the last will of a person who should die after the 12th of July, 1815, was rendered as valid without surrender as if such surrender had been made, except where the existence of a positive custom to the contrary is established; *Doe dem. Winder* v. *Lawes*, 7 A. & E. 195; *Doe dem. Dand* v. *Thompson*, 7 Q. B. 897; and now by the 3rd section of 1 Vict. c. 26, the power of testamentary disposition is extended to all kinds of property whatsoever.

In the case of *Robinson* v. *Savile*, the payment of interest on the mortgage was held to be an admission of assets. So also it has been held that where a personal representative admits the payment of one legacy it is a sufficient admission of assets as to all: *Cook* v. *Martyn*, 2 Atk. 2; *Barnard* v. *Pumfrett*, 5 Myl. & Cr. 63.

KEECH *v.* SANDFORD.

Oct. 31, 1726.

Lease of a market devised to a trustee for the benefit of an infant; lessor, before expiration of the lease, refuses to renew to the infant; trustee takes it himself, shall be obliged to convey to the infant, and account for the profits.

A PERSON being possessed of a lease of the profits of a market, devised his estate to trustee in trust for the infant; before the expiration of the term the trustee applied to the lessor for a renewal, for the benefit of the infant, which he refused, in regard that it being only of the profits of a market, there could be no distress, and must rest singly in covenant, which the infant could not do; there was clear proof of the refusal to renew for the benefit of the infant, on which the trustee gets a lease made to himself. Bill is now brought to have the lease assigned to him, and to account for the profits, on this principle, that wherever a lease is renewed by a trustee or executor, it shall be for the benefit of cestui que use; which principle was agreed on the other side; though endeavoured to be differenced, on account of the express proof of refusal to renew to the infant.

* LORD CHANCELLOR.—I must consider this as a trust for the infant; for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to cestui que use; though I do not say there is a fraud in this case, yet he should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the [* 62]

least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to cestui que use. So decreed, that the lease should be assigned to the infant, and that the trustee should be indemnified from any covenants comprised in the lease, and an account of the profits made since the renewal.

No rule in equity is more firmly established than that where a trustee for an infant renews a lease in his own name, the renewed lease shall enure for the infant's benefit: *Blewett* v. *Millett*, 7 Bro. P. C. 367, Toml. ed. The ground for decreeing renewals by trustees to enure to the benefit of the infant is public policy, to prevent persons in such situations from acting so as to take a benefit to themselves. "It may seem hard," said Lord King "that the trustee is the only person of all mankind who might not have the lease;" but the interdict is incident to the office of trustee and not to the individual in the abstract, who might have kept himself at arm's length. The position is one of his own seeking, and one most jealously regarded by Courts of equity. In the case of *Keech* v. *Sandford* the interest had not expired when the renewal was granted; but in the later case of *Griffin* v. *Griffin*, 1 Sch. & Lef. 352, the lessor had brought an ejectment, and recovered the possession from an infant whose rights and interests in a renewal, so far as the lessor was concerned, were thereby concluded, and then made a new lease to the uncle of the infant; but inasmuch as a Court of equity will never suffer that to be done indirectly which it prohibits directly, it was held that the relation of the parties was such as rendered the new lease bound by the trust for the benefit of the infant. The principles above laid down have been recognised and confirmed in the cases of *Taster* v. *Marriott*, Amb. 668; *Pickering* v. *Vowles*, 1 Bro. C. C. 198; *Eyre* v. *Dolphin*, 2 Ball & B. 290; *Tanner* v. *Elworthy*, 4 Beav. 487; *Waters* v. *Bailey*, 2 Y. & C. C. C. 219; and *Jones* v. *Kearney*, 1 Dru. & War. 134.

HUGHES *v.* GAMES.

By custom, with consent of the homage, new copies may be granted; Q. whether good custom without.

IN this case it was admitted, that a lord by custom may make new grants of part of the manor to hold by copy; and a case was cited to that purpose.

LORD CHANCELLOR.—In the case cited such grants were made with consent of the homage; the question here is, whether there be a custom to do it without the homage, and that must go to law; and then it will be by them considered, how far a custom to make such grants, without the homage, be a good custom,

It was said, Lord Chief Justice *Pemberton* had a copy in this manor.

The question as to whether the consent of the homage, i. e. of the tenants present in the lord's Court, will be requisite for the purpose of enabling the lord to make a new grant of part of a manor, is best resolved by the following consideration, viz. that wherever the rights of other tenants are affected by such a grant there primâ facie their consent would be necessary to its validity, for however strongly the custom of dispensing with their consent may be established, yet, it is quite clear that its exercise, when prejudicial to the absent tenant, will be restrained: see *Badger* v. *Ford*, 3 B. & A. 153; *Hilton* v. *Earl Granville*, 5 Q. B. 701.

It is laid down in Bacon's Abridgment, vol. 2, p. 206, that, "lands parcel of the waste of the manor may by custom be granted by copy of Court roll, though they have never been so granted before; for it is only necessary that the lands should immemorially have been *demisable*, as here they are, by a custom which has immemorially attached upon them, not that they should have been immemorially *demised*:" see also *Northwick* v. *Stanway*, 3 B. & P. 346; *Roe* v. *Newman*, 2 Wils. 125; *Revell* v. *Jodrell*, 2 T. R. 415.

COLE *v.* RUMNEY.

Nov. 7, 1726.

Bill by executor dismissed with costs out of assets; which, if deny, to be examined on interrogatories.

EXECUTOR brings a very frivolous bill, which was dismissed with costs out of assets; ordered to be examined on interrogatories, if deny assets. So done in another cause the next day.

The judgment at law is always de bonis testatoris et si non de bonis propriis; whereas in equity it is discretionary whether the executor shall in such case be made to pay costs or not: *Uvedale* v. *Uvedale*, 3 Atk. 119. It is only where the conduct of executors either in the prosecution or defence of a suit has been very culpable that costs have been decreed against them de bonis propriis, as where they have acted fraudulently; *Hide* v. *Haywood*, 2 Atk. 126; or with gross misbehaviour, as that of "paying simple-contract debts preferable to a bond creditor with notice;" *Jefferies* v. *Harrison*, 1 Atk. 468; or where their resistance to the payment of a surgeon's bill was manifestly so imprudent as to be inexcusable, as where in an action at law they had succeeded in reducing the amount (75*l.* 16*s.*), by 5*l.* only, but at an expense to the estate of 200*l.*, they were saddled not only with the costs of the surgeon's action at law, but with their own costs and expenses in respect of the action: *Chambers* v. *Smith*, 2 Coll. 742.

It is a settled rule, says Lord Redesdale, that the executors of an insolvent shall not have costs; to allow them would be productive of the worst effects; they need not have administered: *Adair* v. *Shaw*, 1 Sch. & Lef. 280. Where the only object of administering to an intestate, insolvent as to his personal estate, was to work out an equity which did not exist directly, it was held, that the administration taken out for such a purpose was not justifiable: thus, where a person after covenanting to pay certain annuities, had conveyed his lands to a purchaser, expressly subject to the annuities, and died intestate,

and insolvent as to his personal estate, and the annuitants in a suit against the purchaser had been declared entitled to recover only six years' arrears of their annuities; it was held that where one of the annuitants had taken out administration with the view of enabling another of the annuitants to bring an action against him on the covenant of the intestate, and had suffered judgment to go by default, the administrator had no equity to be indemnified out of the lands against his liability under the covenant and judgment: *Byrne* v. *Duignan*, 3 Jones & Lat. 116. In this respect, personal representatives differ from the heir, "for it is the law which casts the descent upon him, and if he has accounted justly for such money as is come to his hands, it certainly entitles him to his costs:" *Humphrey* v. *Morse*, 2 Atk. 408. Personal representatives, however, are entitled to the immediate payment of their costs of an administration suit, though by the Master's report they may be found indebted to the testator's estate; the costs are in the nature of a remuneration for the duties which they by their office are bound to perform: *Stevens* v. *Pillen*, 12 Jur. 282; coram Wigram, V. C.

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* GIBSON *v.* SCUDAMORE. [* 63]

Person obliged to lay out trust-money to be settled on herself for life, remainder to the heirs of A.; she buys lands not of the value of the trust-money, and devises those lands to B., who is heir-at-law to A., and also her own right heir; and gives several legacies, which could not be paid if the devise were not to be taken as part satisfaction; and for that reason so decreed.

MRS. SCUDAMORE in the year 1699, leaves to Mrs. Prince the sum of 8784*l.* in trust to be by her invested in lands, and to settle the same on herself for life, and then to the heirs of Lord Scudamore; a decree was had against Mrs. Prince, to lay out the money in lands, and to settle the same according to Mrs. Scudamore's will in 1699. Mrs. Prince purchases lands to the value of 3300*l.* and makes her will, whereby she devises to Miss Scuda-

more, (who was heir-at-law to Lord Scudamore,) and her heirs, this land which she had purchased, and gives several legacies, and devises all her personal estate also to Miss Scudamore, after payment of her debts and legacies.

Miss Scudamore was heir-at-law also to Mrs. Prince; the question here was, whether this estate purchased and devised of the value of 3300*l.* should be considered as part of the trust-money of 8784*l.*; if it should, there would be assets sufficient to pay the legacies else; so whether this is to be considered as a particular devise, or a devise in satisfaction of the trust.

That it should be considered as in part satisfaction of the trust, it was argued, that it is the constant justice of this Court, that if a father, who is obliged to settle lands, suffer lands of equal value to descend, it shall be deemed to be as a completion of the settlement, and done in satisfaction of it; here Mrs. Prince leaves this estate which cost 3300*l.* to the same person, and in the same manner as she was prescribed to do it. It is the intent of the person who makes a will, that every part of it should take effect; which cannot be here, unless it be in part satisfaction of the trust which she was obliged to perform: here Miss Scudamore is Mrs. Prince's heir-at-law, and if it had not been devised to her, she would have had it without the will; so by giving it her, must be taken to be a satisfaction of what she was obliged.

On the other hand it was said, this cannot be said to be a satisfaction, because satisfaction must be to go in the same way as the thing to be satisfied; the will is to have it settled on the right heirs of Lord Scudamore, this is to the heirs of Miss Scudamore; and though Miss Scudamore is right heir to him, yet it may so happen that the right heir of Miss Scudamore, may not be right heir to Lord Scudamore; [* 64] for under the will of Mrs. Prince it may go to the heirs of the part of the mother; and what is a satisfaction must exactly square with the conditions of the thing for which it is to be a compensation.

There is no proof of its being purchased with the trust-money.

LORD CHANCELLOR.—We will take it, it is not bought with the trust-money. The case is, a person under obligation to lay out money, and to settle the estate on herself for life, and the fee on the defendant, *devises* an estate to her in fee, which is the estate she was to have conveyed to her; for her estate for life ceased by her death; as it will be impossible to make good the legacies left by her will, unless the estate be taken to be given in part of the trust, equity should construe it so; else she would be inconsistent to give legacies which could not be paid; it would be to suppose her to act in an illusory manner in the most serious act of her life. That the will may be satisfied, I must take this designed as part satisfaction. Besides, as Miss Scudamore is her heir-at-law, it seems to speak, that as she left it her by devise, that it was her intent to satisfy part of the trust; for if she had intended it as a bounty, it would have had that effect if she had made no devise at all. We do not always here consider what the strict intent of the party was, but consider what is equitable and just; and then suppose the party meant that, and so decree it; else I am sure nine in ten of our decrees could not be supported; if this be not considered as a part satisfaction of the trust, the will cannot be performed, and for that reason must be taken so to be; there are a thousand cases in this Court, where the leaving a person a legacy, to whom money is due, is a satisfaction; and that is this case. Whether she takes as heir to Lord Scudamore, or to her and her heirs, will be the same thing as to this.

The case of *Gibson* v. *Scudamore* was one of implied satisfaction resolving in effect that, in construing a will, Courts of equity will presume that a testator intends to be just before he is generous; and, as it would have been impossible otherwise to have given effect to the whole of the will, the devise was considered as a part satisfaction of the obligation which the devisor was bound to have fulfilled. We have seen, ante, *Savile* v. *Savile*, in notis, p. 98, that satisfaction is a question entirely of intent (*Goldsmid* v. *Goldsmid*, 1 Swanst. 219), and that slight differences, per se, will not be sufficient to rebut the pre-

sumption of satisfaction. In questions of satisfaction, says Lord *Hardwicke*, the thing given in satisfaction must be of the same nature, and attended with the same certainty, as the thing in lieu of which it is given; and land is not to be taken in satisfaction for money, nor money for land: *Bellasis* v. *Uthwatt*, 1 Atk. 426. It is to be observed, that, in the case of *Gibson* v. *Scudamore*, the thing given was of the same nature as that which the devisor was bound to have given.

Under pretext of seizing bankrupt's effects, got him taken in an action; it is an abuse of the process of the Court.

TWO persons having authority to seize the effects of a bankrupt, broke open a closet, where the bankrupt was, to search for them; two officers came soon after them and took him in an action, and threw him into the Counter, where he was served with several other actions in custody; it was ordered that they at their own costs should procure him to be discharged out of custody, or to stand committed, being an abuse of the process of the Court.

[* 65]

* GARDINER *v.* PAINTER.

Nov. 12, 1726.

[APPEAL FROM THE ROLLS.]

Mortgagor makes a settlement of the mortgaged premises after marriage, and after mortgages again, the second mortgagee having notice of the jointure; yet the jointure being voluntary is void as to him, being a purchaser.

Vide Prec. Chan. 101, contra.

A MAN who had mortgaged his estate marries; after marriage makes a settlement on his wife of the mortgaged estate, which was recited to be in consideration of a portion paid; and then he mortgages it a second time; it appeared, that the second mortgagee had notice of the jointure at the time of the mortgage. There were no articles previous to the settlement, nor any money proved to be paid after marriage.

She brings her bill to be let into her jointure, on payment of one-third of the money due on the first mortgage, with-

out being obliged to redeem the second mortgage, as having had notice of the jointure.

Decree at the Rolls, that she should not be let into her jointure, without redeeming both.

In support of the decree it was said, this is a settlement after marriage, and voluntary; and therefore by all the rules of law and equity it is fraudulent against purchasers, be the purchase with or without notice; to which the Chancellor said, to dispute that is to debate whether two and two make four.

On the other side it was said, the jointure was made in consideration of a portion, and therefore for valuable consideration; a settlement may be made after marriage, and not be fraudulent against purchasers; as if a marriage be had, and after a sum of money is paid, and a settlement made in consideration of that, it will be good.

Lord Chancellor.—That would be as a new agreement for a valuable consideration, and for a sum of money to which he had not been entitled unless he had consented to the making such a jointure, and would be good against purchasers; but if he makes a jointure in consideration of money which he was then entitled to, it is voluntary; and it can never be a question, whether a voluntary settlement be good against purchasers.

Decree affirmed.

By the 27 Eliz. c. 4, s. 2, it is enacted, "That all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use or uses of, in, or out of any lands, tenements, or other hereditaments whatsoever, had or made at any time heretofore since the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made for the intent and of purpose to defraud and deceive such person or persons, bodies politick or corporate, as have purchased or shall afterwards purchase in fee simple, fee tail, for life, lives, or years, the same lands, tenements, and hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged, incumbered, or limited in use, or to defraud and deceive such as have or shall purchase any rent, profit, or commodity, in or out of the same or any part thereof, shall be deemed and taken only as against

that person and persons, bodies politick and corporate, his and their heirs, successors, executors, administrators, and assigns, and against all and every other person and persons lawfully having or claiming, by, from, or under them, or any of them, which have purchased or shall hereafter so purchase for money or other good consideration, the same lands, tenements, or hereditaments, or any part or parcel thereof, or any rent, profit, or commodity in or out of the same, to be utterly void, frustrate, and of none effect; any pretence, colour, feigned consideration, or expressing of any use or uses to the contrary notwithstanding."

Marriage, in cases where the settlement has been executed *before* its solemnization, has always been regarded as a valuable consideration, and as such to give to the wife and children a preferential claim over any incumbrancer on the subject of the settlement; *Campion* v. *Cotton*, 17 Ves. 263; *after* solemnization, however, marriage no longer retains the same advantages as against a subsequent purchaser for value: *Partridge* v. *Gopp*, Ambl. 596; *Lister* v. *Turner*, 5 Hare, 281. In short, if after marriage there be not an actual bonâ fide consideration, moving from the party who claims under a post-nuptial settlement, as against a purchaser for value, the post-nuptial settlement is voluntary and cannot be sustained, even though the subsequent purchaser for value take with notice of the settlement: *Gardiner* v. *Painter*; *Evelyn* v. *Templar*, 2 Bro. C. C. 148; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84: such a settlement, however, will prevail against a will made in favour of an after-taken wife, and the children of such marriage: *James* v. *Bydder*, 4 Beav. 600. So, a settlement made after marriage will be rectified by articles before marriage as against volunteers: *West* v. *Errissey*, 2 P. Wms. 349. The rule is, à fortiori, more strict when the contention is between a purchaser for value and a collateral, however meritorious the consideration may have been; see *Buckle* v. *Mitchell*, 18 Ves. 100; *Stackpoole* v. *Stackpoole*, 4 Dr. & War. 320; *Cotterell* v. *Homer*, 13 Sim. 506; though, if the covenant be in favour of a collateral or even a mere stranger, it will not be competent for either of the covenanting parties, or for any other than a purchaser, to impair the integrity of the settlement: *Davenport* v. *Bishopp*, 2 Y. & C. C. C. 451.

Where a settlement had been agreed to be made and rested only in articles; a purchaser *with notice* of the articles was held to be bound by them: *Davies* v. *Davies*, 4 Beav. 54; although it was there contended, on the authority of *Cordwell* v. *Mackrill*, 2 Eden. 344, that the purchaser was not bound to take notice of an equity arising out of the mere construction of uncertain words;—*aliter* as to a purchaser *without notice* of the articles: *Warrick* v. *Warrick*, 3 Atk. 291. The anonymous case in Pre.

Ch. 101, to which reference is made in the margin, is the only authority, if authority it can be called, which at all impugns the otherwise uniform course of decisions on the statute.

Where a voluntary settlement contains a power of revocation, this of itself is sufficient under the fifth section of 27 Eliz. c. 4, to invalidate it against a subsequent purchaser: *Twyne's case*, 3 Rep. 80 *b*. An indefinite power of mortgaging has been held to be equivalent to a power of revocation: *Tarback* v. *Marbury*, 2 Vern. 511; see also *Cross* v. *Faustenditch*, Cro. Jac. 180. The result of the authorities upon this statute, for the protection of purchasers, seems to be that every settlement to be availing must be in its nature irrevocable; and, if postnuptial it will be avoided by a subsequent purchaser, even with notice, unless it is satisfactorily proved that it was made in consideration of an equivalent moving from the party interested in upholding the settlement: *Stileman* v. *Ashdown*, 2 Atk. 479. It is to be observed that this statute does not affect personal property; a party interested under a settlement of personalty can only be defeated by showing that the settlor was indebted at the time of its execution to an amount beyond his assets: *Jones* v. *Croucher*, 1 Sim. & St. 315; see post, *Procter* v. *Warren*.

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* DR. BETESWORTH *v.* DEAN AND CHAPTER OF ST. PAUL'S. [* 66]

Nov. 16, 1726.

Lease made before disabling statute of 13 *Eliz., with covenant to renew for ninety-nine years, shall not be obliged to renew for the term allowed by the act.—But this reversed in the House of Lords.*

IN the tenth year of Queen Elizabeth, the Dean and Chapter of St. Paul's made a lease to the Master and Fellows of Trinity Hall in Cambridge, of the land on which Doctors Commons is now built, for the term of ninety-nine years, to commence after the expiration of a lease then in being, in trust for the Doctors in Commons, under the yearly rent

of 5*l.* and the Doctors giving their advice to the Dean and Chapter gratis, and new building the houses and residence of the Doctors there. In the lease there was a covenant for renewal for ninety-nine years, on surrender of the old lease, and payment of 20*l.*, in which future renewed lease there was to be the like covenant of renewal on surrender toties quoties. Afterwards the act of 13 & 14 Eliz. was made, by which ecclesiastick bodies are restrained from making leases in corporation or market-towns for above forty years. The houses were burnt down in the great fire 1666, and under the act for settling of property the lease renewed. The lease being now near expiring, bill is brought on behalf of the Doctors in Commons, against the Master and Fellows of Trinity Hall in Cambridge, to oblige them to surrender up the lease to the Dean and Chapter of St. Paul's, and to procure a lease from them for forty years in trust, and with the same covenants as in the former lease.

This case was argued 16th Nov. 1726, after the Chancellor called to his assistance Lord Chief Justice *Raymond*, his Honour the Master of the Rolls, and Mr. Justice *Price;* and on 13th March, 1726-7, the Court delivered their opinion.

It was argued against the renewal, that this was an entire covenant, and could not be apportioned; the Act of Parliament intervening is a repeal of the covenant. So is Salk. 198.

On the contrary it was insisted, that the Act of Parliament is not a total, but a partial disability; and even at law, if the thing itself cannot be done, it shall be done as near as the persons are capable. Litt. Sect. 352. So here, though the covenant be for a lease of ninety-nine years, and the Act incapacitates them from making a lease for above forty, yet equity will interpose, and oblige them to do what is reasonable; that is, comply with their covenant as *far as is in their power. According to the rules of law, if mortgagor does not pay the money at the time, the estate is gone; yet in equity, on payment of principal and interest, shall be admitted to redeem, and that is the mortgagor's

Litt. Sect. 352.

[* 67]

own fault. Nothing is more frequent, than that a covenant may be abridged by consent; this is done by Act of Parliament, in which every one's consent is included. There are many cases where the thing contracted cannot be done, yet it shall be done as far as possible; as if A. has a power to make leases for twenty-one years, and he makes a lease for thirty-one, this is certainly a void lease at law; yet in this Court will be good for twenty-one years. 1 Chan. Rep. 23, *Pawsey* v. *Bowen*. Suppose a man has a term, and agrees to assign his term of ninety-nine years; when it comes to be examined, the term is found to be but for fifty years; yet in equity he shall be obliged to assign that term. As to the case in Salk. 189, where it was resolved, that if a man covenants to do a thing, which at that time was lawful, and an Act of Parliament makes it unlawful, the covenant is repealed; that is certainly so; but that is only where it is totally unlawful; but if a covenant were to deliver ninety quarters of wheat in France, and an Act of Parliament should after say, no one shall export above eighty, he would be obliged to deliver eighty; for should fulfil his covenant as far as is in his power.

1 Chan. Rep. 23.

Mr. Justice PRICE was of opinion no lease should;

The MASTER OF THE ROLLS, that a lease for forty years should be made; but I did not hear their reasons.

LORD CHIEF JUSTICE RAYMOND.—This lease was in its original creation a good lease, as if made by any other person who had the whole fee, and might bind themselves by bonds and covenants, as any natural persons might have done; though the case of Bishops might be different, because they could not do so without their Deans and Chapters; but Deans and Chapters have the whole fee, covenant would lie at law; but had it been brought at law, it must have been for the whole term; it has been said, that omne majus continet in se minus; but the rules of contract must be observed, they are intire and cannot be apportioned; they must be intirely destroyed, or intirely subsisting. 1 And. 235, pl. 252. The contract he has entered into is what he is obliged to perform, and that only. 5 Co. *Ford's case*.

1 And. 235, pl. 252. *Coke* v. *Bacon*. 5 Co. *Ford's case*.

* If a person makes a contract, it must be exactly pursued, [* 68]

or shall never recover. If a person were to contract for two sorts of corn, if he lays it generally, will be nonsuit. So that I conclude, before the Act, covenant could not have been brought for a forty years lease; because the action must be brought on the covenant made, and no other, for that is the only one to be performed.

Statutes of 13, 14, 18, & 43 Eliz. by the preambles and mischiefs recited, are long and unreasonable leases, *saving* to any lease hereafter to be made on surrender of a former lease; this saving was of absolute necessity, for by the *proviso* it appears there had been covenants for renewal; and without this the leases to be made after the Act could not have been for longer than twenty-one years, and the former covenants could have been of no effect: by the penning of the statute concurrent leases are plainly admitted of. 1 Ven. 246. All these statutes are to be construed one into another. Hob. 269, *Crane* v. *Taylor*; for which case see Winch, which may be right, but not for the reasons assigned in Hob.

Since the Statute, I am of opinion, no action at law would lie for the breach of the covenant; for by the Statute it is now not a legal covenant.

There are cases, that leases not warranted by the Statute shall be good while the head continues; and so is Co. Lit-
Hard. 326. tleton; but Hard. 326 is, that it is not good in case of corporations aggregate; though it is good in respect of sole corporations, as bishops. I cannot conceive how they should be good in respect of corporations aggregate, during the continuance of the head, for a manifest prejudice may thereby arise; because, as the members of the corporation are fluctuating and changing, other persons may become members during the continuance of the lease, who were not concerned in making it, and would have been intitled, had it not been made; but that is not the case of corporations sole; for as they are intitled to the whole profits, nobody can suffer but the person who made the lease, and he has no reason to complain, as it is his own act.

And as cannot recover at law on this covenant, for that very reason cannot recover in equity.

Where damages are to be recovered at law, for the

breach of a covenant, equity will compel a specific execution of such act, for the not doing of which the law gives damages, and that for this reason; as an adequate compensation is to be made on the covenant, the *quantum* * of the damages may be very uncertain; and therefore to prevent that uncertainty, equity will inforce a specific execution of the thing. [* 69]

I take this to be a certain clear rule of equity, that a specific performance shall never be compelled, for the not doing of which the law would not give damages.

The covenant to oblige them to make a lease for ninety-nine years is gone; and damages cannot be recovered for part of a covenant; and therefore am of opinion equity cannot interpose.

Lord Chancellor.—I take no proposition to be more clear, than that if a man had covenanted to do an act, which by an Act of Parliament made afterwards he would be disabled from doing, that works a release; but were there any doubt, the *proviso* makes it very plain. Can it be said, it would be a breach of covenant not to do a thing which an Act of Parliament says, when done, shall be void. The reason why specific performances are in this Court, is, because the lien is subsisting at law, and the law can only give damages, which may not be adequate; but here the lien is gone; this cannot be said to be a purchase, for a purchase is where it is mutual; this is only to renew if lessee pleases, and is merely a personal covenant; action at law cannot be for a lease for forty years, for the breach must be assigned according to the covenant; and to bring it for forty years would be to make this a new covenant. And I cannot oblige them to make a lease for forty years. Bill dismissed.

But this decree was reversed by the Lords.

The two principles enunciated in the case of *Betesworth* v. *Dean of St. Paul's*, before it was reversed in the House of Lords (1 Bro. P. C. 240, Toml. ed.), were these:—1st, that "it is a clear rule of equity

that a specific performance shall never be compelled for the not doing of which the law would not give damages;" and 2ndly, that a covenant which had been entered into by a lessor for the renewal of a lease for a period which by a posterior statute he was disabled from granting, could not in a Court of equity be enforced for a period allowed by the statute, though less than what was originally stipulated. These two principles however, were distinctly overruled by the judgment on the appeal, and the very reverse may now be said to furnish the test for equitable interference; for it is clearly established that Courts of equity will not entertain a suit for specific performance where a Court of law would give damages, and such damages would be adequate compensation: *Cud* v. *Rutter*, 1 P. Wms. 570; and see ante, *Child* v. *Pitt*, page 16, in notis, page 57. It is only where the injured person cannot be fully compensated by damages that specific performance will be decreed: *Duncuft* v. *Albrecht*, 12 Sim. 189; *Wood* v. *Rowcliffe*, 3 Hare, 304. Another instance in disproof of the first proposition in the text, viz., that equity will not grant relief where damages cannot be recovered at law is exemplified in the case of assignments of contracts; at law it is indispensable that there should be a privity of contract, so that the particular assignee of one contracting party could maintain no action at law against the other contracting party on the contract, but a bill in equity may be filed by either of them against the other for a specific performance or a rescission of the contract in the same way as such bill might be filed by either of the original contracting parties: *Prosser* v. *Edmonds*, 1 Y. & C. 481.

With regard to the second proposition viz., as to the partial performance of contracts, it may be laid down as a general rule that an entire contract cannot be apportioned: 3 Vin. Abr. tit. Apportionment. At law they are to be performed in toto or not at all: *Cutter* v. *Powell*, 6 T. R. 320; and see 2 Smith, L. C. 1; but Courts of equity will decree a part performance in many cases where an adherence to the strict rule of law would work an injury, for they will "not permit the forms of law to be made instruments of injustice:" *Halsey* v. *Grant*, 13 Ves. 73, and see page 77. And even at common law it has been a well settled rule from *Pigot's case*, 11 Rep. 27 *b*, down to the latest authorities, that where there are contained in the same instrument distinct engagements by which the party binds himself to do certain acts, some of which are legal and some illegal, the principle is that those which are legal may be enforced, and those which are illegal cannot. A fortiori, then, will the contract be enforced if the disability to perform it in its integrity is caused by the provisions of a statute posterior to the date of the contract: *Betes-*

worth v. *Dean and Chapter of St. Paul's*, 1 Bro. P. C. 240, Toml. ed. This, however, is very different from a Court of equity lending its aid to establish a contract which by reason of some positive violation of statute law is, ab initio, void; as, on the sale of a ship, if there be wanting the formalities required by the Register Act, 34 Geo. III. c. 68, no relief can be obtained in equity; for, as observed by Sir *T. Plumer*, "the Act of Parliament destroys the contract when not according to the prescribed forms: a man has not, as in other cases, a contract to stand upon:" *Thompson* v. *Leake*, 1 Madd. 39, 43.

An agreement may be void at law and yet a specific performance decreed in equity, if there is a clear equity in favour of its being specifically performed: thus, in the case of *Cannel* v. *Buckle*, (2 P. Wms. 242), a woman gave her bond to her intended husband, in case of marriage, to convey certain lands in fee to him, and died after their marriage without issue; the heir of the husband who survived her was held entitled to have the land conveyed in pursuance of the terms of the bond.

Generally speaking a purchaser is in equity entitled to have as much of a contract performed as the vendor can perform, deducting from the purchase-money the amount equivalent to the deficiency in quantity or quality (*Hill* v. *Buckley*, 17 Ves. 394); and in such cases a Court of equity executes the contract cy pres. In short, it will not suffer a vendor to escape from his contract, provided the purchaser is willing to accept such an estate as the vendor can give, and the inability to complete is estimable. Thus, after a vendor had undertaken to sell an estate, and it was ascertained that he could only sell the reversion, it was held he could not rely on the conditions of sale, whereby any objections to the title were stated to be grounds for a rescission of the contract, and there the value of the preceding interest was deducted from the purchase-money, and specific performance decreed (*Nelthorpe* v. *Holgate*, 1 Coll. 203); but where the extent of the deficiency is not clearly ascertainable by reason of the vagueness of the particulars, and no fraud was imputable to the vendor, there the Court dismissed a bill for specific performance: *Lord Brooke* v. *Rounthwaite*, 5 Hare, 298; and see *Thomas* v. *Dering*, 1 Keen, 729; *Graham* v. *Oliver*, 3 Beav. 125. And there can be no reasonable ground for contending that there is any difference in principle where the impracticability of fulfilling a contract has arisen out of matter subsequent to the negotiation, and where there has existed at the time of the contract some impediment to its being completely effectuated, provided the disappointed party is willing to accept the modified contract, and the difference is susceptible of being easily appreciated.

[CHANCELLOR.]

Nov. 17, 1726.

No new relator in information, without consent of the Attorney-General.

INFORMATION filed in the name of the Attorney-General, at the instance of a relator; no other relator to be without the consent of the Attorney-General.

BURROWS *v.* JEMINEAU.

Nov. 22, 1726.

Sentence of a foreign court who have jurisdiction, and the persons are within it, is conclusive.

BILL of exchange was drawn in London, payable by A. at Leghorn, who accepted it, and was indorsed by several persons. By the law of Leghorn, if the drawer fails the
[*70] acceptor is no further bound to pay than he has effects *of the drawer's in his hands; to which purpose there was sentence in the Court of Leghorn, which was read here; the acceptor came into England, and action was brought against him; injunction was had; and now bill brought to make the injunction perpetual. In support of the injunction it was said, that the law-merchant was an universal law, that it extends to all trading people, and not to be circumscribed by local or municipal laws; and if it were not so, it would be destructive to trade and commerce, that the acceptor, on whose credit others indorse or take the bill, should not be liable: but it appears, by the depositions of several emi-

nent merchants, that it is not the law of Leghorn; but if it were so, that may be taken advantage of at law, and be only a conditional acceptance.

To which it was answered, that where a foreign Court has jurisdiction, and the persons are within it, the sentence of that Court must bind; and by that particular must be guided without regard to what the law is in other places.

Lord Chancellor.—Here is a sentence by a proper Court who have jurisdiction of the cause, and the persons are within it. I can have no regard to what merchants say is the law of Leghorn, since I have the sentence of the Court here, by which I do think myself bound. I remember in some of the reports in Charles 2nd's time, a man killed another in Portugal, and was indicted for it here on the statute; he pleaded a trial and acquittal there, and held a good bar. [That case is cited 3 Mod. 194.] There are many cases in Roll's Abridgment, of sentences of foreign admiralties carried into execution here; had I been to try it, I should have admitted it as evidence. I remember when I was Recorder of London, I asked Lord Chief Justice *Holt*, whether I should oblige them to plead a sentence of a foreign admiralty, or admit it to be given in evidence; he said, whatever defeats the promise may be given in evidence on non assumpsit. It is every day's experience, if sailors bring action for their wages, a sentence in the admiralty will conclude them; because the Court had a proper jurisdiction, and they have made their election: I should think it a proper defence at law, but different men may have different opinions; there may be little niceties and formal objections at law; here we come to the real justice of the case. So perpetual injunction, but without costs.

"A decree determining the rights of the parties, and signed and enrolled may be pleaded to a new bill for the same matter; but the decree must be in its nature final," Mitf. Pl. 4th ed. 237. It cannot be pleaded in bar of a new bill, unless it is conclusive of the rights of the plaintiffs in that bill, or of those under whom they claim, ib. 238.

It may however be observed, that although the judgment itself cannot be called in question here, a commission will be granted to examine as to the extent of the jurisdiction in the foreign Court, when its powers are disputed: *Gage* v. *Lady Stafford*, 2 Ves. 556.

The plea of "autrefois acquits," as referred to by the L. C. in his judgment in *Burrows* v. *Jemineau*, has invariably been considered a conclusive bar against another indictment for the same offence. It is upon an analogous principle, that our Courts of equity have interfered to prevent those within its jurisdiction as well from the institution of proceedings in foreign Courts, where the subject-matter of such proceedings has been tried and decided by a Court of competent jurisdiction here, as from the mooting questions here, which have been formally adjudicated upon by a competent tribunal elsewhere: *Ricardo* v. *Garcias*, 12 Cl. & Fin. 368; *Barrs* v. *Jackson*, 1 Phillips, 582; but "a collusive suit is not a real judgment," and "what is obtained by fraud from the Court is not binding:" *Meddowcroft* v. *Huguenin*, 4 Moo. P. C. C. 386; and see the note to the *Duchess of Kingston's case*, in 2 Sm. L. C. 432. The case of *Burrows* v. *Jemineau* has illustrated the latter of the two propositions, upholding the validity and finality of a foreign judgment, when by the plea it appeared to be ad idem.

In upholding *its own* judgment, the Court is actuated by the same spirit in the prevention of a double investigation of the same matter; thus, a suit having been instituted in Ireland for the same purpose as in England, an injunction was obtained by the defendants to the suit in England *after* decree, to prevent the plaintiff from raising the same question in Ireland which had already been decided against him by the decree in England: *Booth* v. *Leycester*, 1 Keen, 579. Under certain circumstances, even *before* a decree, the Courts of this country will restrain parties from proceeding in a foreign Court; thus, where parties were proceeding to recover land in Demerara, and their right thereto by the Dutch Law was primâ facie absolute, yet when there were other questions of election and construction between them, and parties suing them in England, Lord *Langdale* at the instance of these latter parties restrained the proceedings instituted in Demerara: *Bunbury* v. *Bunbury*, 1 Beav. 318; see also *Beckford* v. *Kemble*, 1 Sim. & St. 7. And so when a bill was filed in England to set aside a bond given for an illegal consideration, the defendants were restrained from proceeding on the bond in the Court of Session in Scotland; *Bushby* v. *Munday*, 5 Mad. 297; *Harrison* v. *Gurney*, 2 J. & W. 563; *Beauchamp* v. *The Marquis of Huntley*, Jac. 546; *Lord Portarlington* v. *Soulby*, 3 Myl. & K. 102; see also the observations of

Sugden, L. C., in *Ridge* v. *Newton*, 2 Dr. & War. 239, 245.

Where the parties are within the jurisdiction and proceeding in another Court in England for the same matter, à fortiori will a plaintiff be restrained from harassing a defendant by the double procedure: *Wilson* v. *Wetherherd*, 2 Mer. 406: and now by the 16th Order of May, 1845, Article 20, a defendant may, as of course, in eight days after his answer, obtain an order for the plaintiff to elect; see *Hindford* v. *De Costa*, in notis, ante, p. 18. There may doubtless be a state of circumstances under which a plaintiff may be permitted to proceed in another country to obtain the benefit of a decree; as, for example, if the defendants have no available property here, and are themselves out of the jurisdiction; but in no case will a party be warranted in having recourse to such auxiliary measures in the foreign Court, without the special authority of the Court, the benefit of whose decree it is sought to enforce; *Wedderburn* v. *Wedderburn*, 2 Beav. 208; 4 Myl. & Cr. 585, 594; and see also *Graham* v. *Maxwell*, 1 Mac. & Gor. 71, where a creditor proceeding in the foreign tribunal, after notice of a decree in England, was not only restrained but made to pay the costs of an application to restrain him.

* TOWNSEND *v.* LAWTON. [* 71]

Trustee not compelled to suffer recovery, unless for marriage, and to re-settle the estate.

BILL brought to compel a trustee to suffer a recovery.

Lord Chancellor.—In Winnington's case it was done on account of marriage, and to re-settle the estate, in the same manner, which I would also do; but this is for an alienation, so on quite different foundations; I will not take away the remainderman's chance, let the trustee do it, or let it alone.

There have been few cases where a Court of equity has interfered with the control which is vested in trustees to preserve contingent re-

mainders, and it has been only in those where there existed incumbrances prior to and affecting the lands in the settlement, as in the case of *Platt* v. *Sprigg*, 2 Vern. 303; or where the object for which the consent was sought was not to enlarge the original limitations but to abridge them, as where the first tenant in tail proposed on his marriage to reduce his estate to that of tenant for life, there it might be greatly mischievous to a family if trustees should stand out: *Winnington* v. *Foley*, 1 P. Wms. 536. But under no circumstances would the Court interfere to enforce a concurrence to destroy the contingent remainders where such ingredients do not occur: see *Davies* v. *Weld*, 1 Vern. 181: on the contrary, it would consider trustees who joined in a conveyance to destroy the contingent uses or remainders, which they were intrusted to preserve, guilty of a breach of trust: *Pye* v. *Gorge*, 1 P. Wms. 128; 7 Bro. P. C. 221, Toml. ed.; *Mansell* v. *Mansell*, 2 P. Wms. 678.

By 3 & 4 Will. IV. c. 74, fines and recoveries have been abolished and a simpler mode of assurance substituted: by the 22nd section of this Act, the owner of the first existing estate under a settlement prior to an estate tail under the same settlement is constituted the protector of the settlement, and his consent must be obtained to defeat the ulterior limitations: by the 33rd section, in cases of lunacy and felony, the consent of the Lord Chancellor and Court of Chancery respectively is substituted for that of the lunatic or convict tenant for life. For the principles on which the Lord Chancellor will be guided in giving or withholding his consent, see *In the matter of Newman*, 2 Myl. & Cr. 112. In the recent case of *In re Graydon*, 1 Mac. & Gor. 655, Lord *Cottenham* refused to give his consent as protector to enlarge a base fee created by a tenant in tail in remainder, expectant on the life estate of a lunatic, there being ulterior limitations in favour of parties who did not concur.

The Lord Chancellor is not protector of the settlement when the lunatic is tenant in tail: *In the matter of Isaac Wood*, 3 Myl. & Cr. 266; *In the matter of Blewitt*, 3 Myl. & K. 250. But where the lunatic is tenant in tail and has the immediate reversion in himself it is otherwise; and it seems that, for the purpose of making a title to a purchaser of lands ordered to be sold for the payment of debts of such lunatic tenant in tail, the equity of the statute may be extended: *In the matter of Brand*, 1 Myl. & K. 150. But the Court will not interfere, even for the payment of debts, where there are ulterior limitations over: *In re Skerrett*, 2 Dr. & War. 585. By the 31st section the trustee, who before the passing of the Act would have been the person to concur in the disentailment, is constituted the protector of the settlement: and by the 36th section it is provided, that his dis-

cretion shall be wholly unfettered; that "a Court of equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving consent as a breach of trust."

DUKE OF DEVONSHIRE *v.* ATKINS.

Nov. 25, 1726.

AARON KINTON had a lease for three lives from the Bishop of London, which he assigned to trustees, to renew out of the rents and profits toties quoties, and that he should receive the profits during his life; and then settled on several other persons for life, and after to his own executors and administrators; he after became receiver to the Duke of Devonshire, and became indebted to him by simple contract; and after makes his will, and devises this leasehold estate; a bill was brought before Lord Chancellor Cowper, 3 Geo. I., who decreed the lease should be considered as personal assets, and subject to the Duke's debt, which case and resolution is in 2 Vern. 719, but the devisees not being made parties to that decree, the same question is now in dispute. 2 Vern. 719.

It was insisted, that before the Statute of Frauds this was a descendible freehold, and the heir considered as a special occupant, and not liable to simple-contract debts. This is a freehold lease; and notwithstanding the words, "to his executors and administrators," the estate is the same, and shall go according to the legal limitation, viz. to his heirs, and the trust created should be conformant to the estate concerning which the trust was.

The Statute of Frauds gives power to devise an estate pur autre vie; if no devise had been, it had gone to the heir as special occupant, and not subject to simple-contract debts; and the power given by the statute to devise is making the devisee a special occupant; for it is a particular designation

who shall be so, and therefore as such, not to be liable to simple-contract debts.

[*72] * LORD CHANCELLOR.—This is not within the statute, because it is a trust; it is in trust to him for his executors and administrators, and that must be a personal estate; it is in nature of a special occupancy in the hands of the executor; being a trust for him and his executors, and therefore not within the statute.

So decreed, as Lord Cowper had done before, to be liable to the debts.

By the common law, and prior to the statute of 29 Car. II. c. 3, estates pur autre vie were neither devisable nor liable to answer the debts of the grantee, and one incident of their tenure was that in the event of such an estate being demised without any words of limitation, and the cestui que vie survived the grantee, neither the heir nor the personal representative (as such) of the latter would be entitled to the vacant possession; but it belonged to the person who first took possession of it as general occupant. Since that statute, however, where the limitation of such an estate (there being no devise of it) is to the grantee and his heirs, or to him and his executors, the heir in the first instance, and the personal representative in the second, would be entitled as special occupants of the estate for the period between the death of the grantee and the cestui que vie: in the former case it goes to the heir, but subject only to the same debts as a fee simple estate; in the latter case, the executors take it subject to the same debts as personalty of any other description is subject; for "if a man takes an estate as an executor it is assets, for he cannot take anything as an executor of a testator without being so:" *Westfaling* v. *Westfaling*, 3 Atk. 460; and see *Ripley* v. *Waterworth*, 7 Ves. 425. Nor can the estate, even if it be limited to heirs, be devised so as to be exempt from specialty debts, as such estates are clearly within the Statute of Fraudulent Devises, 3 W. & M. c. 14. If an estate is limited to a man, his heirs, executors, and administrators, the heir and not the executor is the special occupant: *Atkinson* v. *Baker*, 4 T. R. 229.

By the 12th section of the Statute of Frauds, 29 Car. II. c. 3, after enabling persons to devise estates pur autre vie, it is provided, that if no devise thereof should be made, the same should be chargeable in the hands of the heir if they should

come to him by reason of a special occupancy as assets by descent, as in case of lands in fee simple; and in case there should be no special occupant, they should go to the executors or administrators of the grantee, and should be assets in their hands: but this statute making no provision as to the surplus of an estate after discharge of debts, it was held that the estate did not lose its freehold character, and that such surplus was neither distributable amongst the next-of-kin, nor so much as assets for the payment of legacies except such as were particularly bequeathed thereout, but that the administrator was entitled to hold it as special occupant: *Oldham* v. *Pickering*, 2 Salk. 464. By 14 Geo. II. c. 20, s. 9, therefore, it was enacted, "that such estates pur autre vie, in case there being no special occupant thereof, of which no devise shall have been made according to the said Act for the Prevention of Frauds and Perjuries, or so much thereof as shall not have been so devised, shall go, be applied, and distributed in the same manner as the personal estate of the testator or intestate." And now, by the statute 1 Vict. c. 26, s. 6, it is enacted, that "if no disposition by will shall be made of any estate pur autre vie of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

BILSON *v.* SAUNDERS.

De Term. Sanct. Mich. Oct. 26, 1727.

[IN THE EXCHEQUER.]

Legacy to bear interest from a year after the death of the testator.

A LEGACY was left to an infant, the testator having a great deal of money in Bank-stock, the executor was residuary legatee; the bill was brought for the legacy, and question was, whether it should bear interest, and from what time.

CHIEF BARON PENGELLY, AND HALE, BARON.—It is a certain rule, that where the fund is certain, as when charged on land, it shall bear interest; because it plainly appears the rents are received; so the fund on which it is charged produces a profit here; it is equally certain, and therefore should bear interest, Salk. 415; *Small* v. *Dee;* and should be from the testator's death.

But this was opposed by Carter and Comings, Barons; that it should only bear interest from a year after the testator's death; for as legacies are to be paid after debts, the executor has that time to inquire; till which are not payable, so not to bear interest; to which it was agreed.

[*73] *A difference was offered to be made, that as this was a legacy to an infant, it could not be safely paid, and therefore should not bear interest.

To which it was answered by the Chief Baron, that it might be safely paid into the hands of an infant, having proper evidence of the payment, as is Wentworth, Exec. 313. And per Carter; may be paid into the hands of the guardian, having evidence; but if takes security from the guardian, which should prove defective, there, as does not

rely on the security the law gives, must depend on that taken at his peril.

The rule is, as laid down in *Bilson* v. *Saunders*, viz. that a legacy bequeathed generally, without any fixed term for payment, bears interest only after the expiration of one year from the death of the testator; and this although the testator's estate is abundantly solvent and yielding interest, in which case the interest goes to the residuary legatee: *Pearson* v. *Pearson*, 1 Sch. & Lef. 10. The exceptions to the above general rule are in favour of specific legacies of stock, or other securities bearing interest; *Barrington* v. *Tristram*, 6 Ves. 345: and legacies to children, or to those as to whom the testator has placed himself in loco parentis; *Raven* v. *Waite*, 1 Swanst. 553: or where the legacy is held to be in satisfaction of a debt; *Clark* v. *Sewell*, 3 Atk. 96: or where real estate is charged with payment of debts; *Maxwell* v. *Wettenhall*, 2 P. Wms. 25, 27.

An executor will not be safe in paying a legacy to an infant, or even to the father of the infant, without the sanction of the Court: *Dagley* v. *Tolferry*, 1 P. Wms. 285. But wherever the direction in the will is to pay the legacy to a trustee for an infant, the executor will of course be duly discharged by pursuing such direction: *Cooper* v. *Thornton*, 3 Bro. C. C. 96; *Robinson* v. *Tickell*, 8 Ves. 142.

HORNSLY *v.* HORNSLY.

De Term. Sanct. Trin. July 2, 1729.

[CHANCELLOR.]

Where legacies are left to two, with a survivor in case of death; if one dies in the life of the testator, the legacy is not lapsed, but shall survive.

A MAN makes his will, and gives 600*l.* to his son John, to be paid with all convenient speed; and gives 500*l.* to his son George, to be paid in convenient time; and appoints his real estate to come in aid of the personal; and goes on and says, "But in case either of my said sons happen to die before they have received all, or any part of their legacy, then the remaining sum or sums shall go and be paid to the survivor."

One of the legatees died in the life of the testator. Bill is brought by the survivor for the legacy left to the deceased.

In this case there was no defence.

2 Vern. 207, 378, 653.

The Attorney-General said, it had been frequently determined, that if a legatee dies in the life of the testator, and there be a survivor created, it shall not be considered as

[* 74]

* lapsed, because there was a survivor created, but be looked on as an immediate devise, and the survivor shall receive both.

And so it was decreed.

It was insisted, as it was charged on land which produced profit, should bear interest from the testator's death.

CHANCELLOR.—The testator has prevented that, by appointing it to be paid in convenient time. So must bear interest only from the usual time of payment of legacies.

This is an instance of that class of cases where, by reason of the death of a legatee in the testator's lifetime, the lapse is not incurred; because the prevention of the lapse is one of the purposes of the substituted gift: *Humphreys* v. *Howes*, 1 Russ. & M. 639; *Mackinnon* v. *Peach*, 2 Keen, 555. The leading case, which is generally referred to in support of this construction, asserted in *Hornsly* v. *Hornsly*, is *Willing* v. *Baine*, 3 P. Wms. 113, where a testator bequeathed 2000*l.* apiece to his children, payable at their respective ages of twenty-one years, and if any of them died before their age of twenty-one the legacy so given was to go to the surviving children. One of the children died in the lifetime of the testator and before twenty-one, and it was held that the legacy to him went to the surviving children. That authority is referred to by Sir *W. Grant* in *Humberstone* v. *Stanton*, 1 Ves. & Beav. 385; and he says, "It is now settled that in such a case the bequest over takes place." The distinction between this class of cases, where in fact the survivor is considered to take substitutionally by force of the original gift, and where he takes by way of remainder, must be kept in view: see *Harris* v. *Davis*, 1 Col. 416; *Andrew* v. *Andrew*, ib. 690.

BAKER *v.* ROGERS.

July 3, 1729.

[CHANCELLOR.]

One tenant of a manor cannot bring bill to quiet him in a customary right which is common to the other tenants.

BILL brought by *one* tenant of a manor, suggesting a custom for the tenants of the manor of A. (of which he was one) to cut turfs in the manor of B. To quiet him, and to have issue directed as to the right, was the end of the bill.

Solicitor-General for the defendant.

The bill is totally improper and inconsistent with the nature and end of such bills, which is, that where several persons have one and the same right, in which they are

disturbed, on application to this Court, to prevent multiplicity of suits, to which each of them are entitled to on their several rights, issues will be directed, and one or two determinations will establish the right of all parties concerned on the foot of one common interest; but in all those bills, either all parties join, or a determinate number in the name of themselves and the rest prefer a bill; but in this case only one person brings the bill on the general right, and not on the foot of any particular distinct right: these kind of applications were admitted to prevent expense and multiplicity of suits; and if this method should take place, would be liable to as many bills as might be to actions of law, so would totally frustrate the end of them, and run into greater inconveniences than those designed to have been avoided; as suits in equity are more expensive than at law.

Attorney-General contra, for plaintiff, admitted the rule; but said, the plaintiff was the only person interrupted, and therefore the others cannot be made plaintiffs; and to make them defendants, would be only bringing them into Court to pay them costs.

[* 75] * CHANCELLOR admitted the rule laid down by the solicitor; and said, that what the attorney said was not suggested in the bill.

So bill dismissed with costs.

Bills of peace have been already commented on; see *Dalton* v. *Dalton*, ante, page 44, in notis. Bills of interpleader, which originate upon an equity very similar to that on which bills of peace are founded, may be here considered. The jurisdiction in equity as to interpleader is thus succinctly laid down by Lord *Redesdale*:—"Where two or more persons claim the same thing by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them:"—Lord Redes. Tr. Pl. 4th ed. p. 48, 49. The expression, "two or more parties," must not be considered as

embracing more than two conflicting claims upon the same record; there may be a plurality of persons interested in respect of one or other of such claims, there can only be a duality of rights. The definition of interpleader is thus given by Lord *Cottenham*, in *Hoggart* v. *Cutts*, Cr. & Ph. 204:—"Where the plaintiff says, I have a fund in my possession in which I claim no personal interest, and to which you the defendants set up conflicting claims; pay me my costs, and I will bring the fund into Court, and you shall contest it between yourselves. The case must be one in which the fund is matter of contest between two parties, and in which the litigation between those parties will decide all their respective rights with respect to the fund:" and see *Glynn* v. *Locke*, 3 Dr. & War. 11. "The plaintiff," says Lord *Loughborough*, "comes upon the most obvious equity to insist that those persons claiming that to which he makes no claim should settle that contest among themselves, and not with him:" *Langston* v. *Boylston*, 2 Ves. jun. 109. If the decision of a Court is sought on a claim which is incidental to the main question, but not common to both defendants, the bill is not sustainable as a bill of interpleader: *Bignold* v. *Audland*, 11 Sim. 24. It is essential to the character of the plaintiff, in such a bill, that he should have no personal interest in the matter in question: *Mitchell* v. *Hayne*, 2 Sim. & St. 63; *Moore* v. *Usher*, 7 Sim. 384: and for this purpose the bill must be accompanied by an affidavit denying collusion between him and any of the defendants: *Errington* v. *Att.-Gen.* 2 Eq. Ca. Abr. 173; and if filed by the officer of a public company, although such officer must be the deponent, yet he must not only swear that he does not collude but that to the best of his belief the society, who are the real plaintiffs, does not collude: *Bignold* v. *Audland*, 11 Sim. 23.

It is well settled that this species of bill may be filed where the claim of one of the defendants is by virtue of an alleged legal, and that of the other upon an alleged equitable, right; *Paris* v. *Gilham*, Coop. 56; *Martinius* v. *Helmuth*, 2 Ves. & Bea. 412; *Morgan* v. *Marsack*, 2 Mer. 107; and an injunction will be granted to restrain both: *Crawford* v. *Fisher*, 10 Sim. 479. There must, however, be an identity in the subject of the respective claims: thus, where a principal, who had a running account with his agent, filed a bill of interpleader against his agent and the assignee of B., a third party who had become bankrupt after the agent had paid a certain sum to B.'s order, which payment the assignee disputed, it was held incompetent for him to maintain the suit as one of interpleader; for if the agent had brought an action against the principal, and recovered the amount of his claim, that would not have prevented the

assignee of B. from bringing his action against the principal and recovering, even although the amounts might be the same: *Glyn* v. *Duesbury*, 11 Sim. 139. Another essential requisite in bills of this nature is, that the claim of neither of the defendants should have been recognised by the plaintiff; for that reason a tenant cannot file a bill against his landlord and a third party claiming by a title paramount to the landlord, nor an agent against his principal and a third party claiming by a right superior to the principal, for they would respectively be precluded from disputing the title—the one of his landlord, the other that of his principal: but where the adverse claim is under a derivative title, or when upon the death of the landlord the tenant had, in ignorance of the rights of the parties, attorned and paid rent to one of them who claimed as devisee, and the heir disputed the will, the tenant was warranted in filing his bill of interpleader against the devisee and heir: *Jew* v. *Wood*, 3 Beav. 579; *S. C.* Cr. & Ph. 185: so, where the agent knows that the party intrusting him with property is a trustee for others, he may protect himself against the claims of the depositor and the other parties in respect of it; as where a ship's husband, acting for himself and other part-owners of the ship, effected an insurance through a broker, and upon a loss sustained the other part-owners and the ship's husband both claimed the whole of the policy received by the broker, the latter was allowed to file his bill of interpleader against the ship's husband and the other part-owners: *Suart* v. *Welch*, 4 Myl. & Cr. 305.

It is said, that if any money is due from the plaintiff he must bring it into court, or at least offer to do so by his bill (Mitf. Pl. 49, 4th ed.), upon the authority of *The Earl of Thanet* v. *Paterson*, Barnard. 247; but though the dictum is there attributed to Lord *Hardwicke*, yet the decision was not grounded on that omission. And, in the later case of *Meux* v. *Bell*, 6 Sim. 175, it was held that the offer to pay the money into Court was not indispensable, though before any steps are taken in the cause it is necessary that the money should be brought in: ib. When brought in and the cause heard the suit is at an end, so far as the plaintiff is concerned: Anon. 1 Vern. 351: if, before the filing of his bill, any interest has accrued or is recoverable at law, the plaintiff seeking the protection of a Court of equity ought to offer to pay that interest: *Bignold* v. *Audland*, 11 Sim. 23. If any interest has accrued since the filing of the bill, a supplemental bill, though not absolutely necessary, seems to be the regular course: see *Crawford* v. *Fisher*, 1 Hare, 436.

Until the passing of 1 & 2 Will. IV. c. 58, the jurisdiction at common law, in cases of interpleader,

was of so circumscribed a character as rarely to have been adopted. The remedy, however, (by interpleader,) such as it was, was principally confined to actions of detinue, although it was applied to a few other cases, such as writs of quare impedit, and writs of ward. But it was not allowed in any personal action except detinue, and then only when it was founded either in privity of contract or upon a finding; 2 Story's Eq. Jur. 102, 2nd ed.; but now, by 1 & 2 Will. IV. c. 58, the remedial process of the common-law Courts is considerably enlarged, while the jurisdiction in equity remains unaffected.

SEPALINO *v.* TWITTY.

July 11, 1729.

[REHEARING.]

Difference between a voluntary deed never out of the party's hands, and by him cancelled, and such a deed which he had or should have parted with.

A., TENANT for life, without impeachment of waste, with power to make a jointure on any wife, not exceeding 100*l.* per annum for each 1000*l.* brought by her, and so rateably for any lesser sum; remainder to trustees to preserve contingent remainders; remainder to the first and every other son in tail male; remainder over. A. marries a woman whose fortune does not appear what, or any; the husband and wife part by consent; a deed is drawn between the husband and wife, and remainderman and trustees, with covenant to settle 30*l.* per annum, for a provision for the wife during the separation, and for a provision for her after the husband's decease; in consideration of which she is to claim no thirds, or any thing of the husband's estate, under the Statute of Distributions: the husband executes this deed, and sends it into the country to be exe-

cuted by the remainderman, who returns the deed, perfected by him to the husband, who does not deliver it to the trustees; the wife makes application for it, but cannot get it; but has money paid to her in pursuance of it; after the husband cancels these deeds in presence of the remainderman; the wife, after the death of the husband, brings a bill against the remainderman, for the benefit of this covenant from the death of the husband; which is so decreed by his Honour the Master of the Rolls. Now comes here an appeal.

Solicitor-General against the decree.

He said, if the deed be on valuable consideration, it is immaterial whether the deed were ever out of the party's hands, because it is on a consideration which is reciprocal; and if in such case the deed be cancelled, yet the Court will oblige the terms of it to be complied with; but if the deed be voluntary, and preserved in the party's own hands, the sealing will not compel the execution of it; and if the party destroys it, the Court will not interpose; for shall be considered only as done to prevent accidents, in case does not change his mind; which he has power to do, while it is in his custody; and here it does not appear to have ever been in the trustees' hands.

[* 76] * Mr. *Lutwich* said, he remembered a very strong case to that purpose; a person made a voluntary deed, and kept it in his custody, the person who was to be benefited by it got the key of the box where it was kept, and took a copy of it; after the person who made the deed cancelled it; and the Court was so far from compelling the execution of such cancelled deed, that injunction was granted to prevent recovery at law on the copy; and declared, that taking away the deed, or getting a copy of it, was a fraud on the party, of which no benefit should be taken.

P. C. 210, 182, 235; 2 V. 473. Lord Chancellor affirmed the decree; and said, that the law was certainly so in the cases mentioned; but here, after the execution of the deed, it was returned to the husband, who should have delivered it over to the trustees, which was intended to have been done, as they were made parties; and shall you now take advantage of his not doing

what he ought to have done, and what you intended he should; tho' it be not proved to have ever been in the trustees' hands, you might have examined them, and cleared up that; nothing is to be presumed in your favour after such a transaction as this. This is a deed submitted to, and acquiesced under, and under it the wife has received money; and as by it she was to have nothing under the Statute of Distributions, she must abide by that.

N. B.—An order in a former cause between the same parties, was read at the Rolls, and an interlocutory order in that cause was offered to be read here, without an order for reading it first had; which was opposed: depositions between the same parties in another cause are not to be read without order; for cannot tell which are designed to be read, so no opportunity of contradicting them; and this is liable to equal inconveniency, for this interlocutory order may be destroyed by subsequent ones.

CHANCELLOR said, the former cause was taken notice of by reading an order made in it; and tho' may not read depositions, yet the Court may read its own acts, and be informed of them.

The doctrine of Courts of equity with regard to voluntary conveyances may be considered under two heads: first, where there has been a complete execution by the author of the voluntary settlement of all the formalities required to give legal efficacy to the provisions of the instrument; and, secondly, where some of the provisions of the deed rest in fieri, and there remains something to be done to consummate the voluntary inchoate act; under the first head, *Villers* v. *Beaumont*, 1 Vern. 100, may be regarded as the leading authority for the proposition, that where a man makes a complete voluntary settlement and does not reserve to himself a power of revocation, there, although the object of such settlement be a pure volunteer, a Court of equity will not entertain a bill by the author of the settlement to be relieved from the consequences of his own act: see also *Allen* v. *Arme*, ib. 365; *Bale* v. *Newton*, ib. 464; *Clavering* v. *Clavering*, Pre. Ch. 235; *Bill* v. *Cureton*, 2 M. & K. 503; *Collinson* v. *Pattrick*, 2 Keen, 123: and this although he had subjected himself to the discretion of a third party in

the administration and extent of the enjoyment of his own property; *Petre* v. *Espinasse*, 2 M. & K. 496; for, as observed by Lord *Nottingham*, "the Court will not loose the fetters he hath put upon himself, but he must lie down under his own folly;" *Villers* v. *Beaumont*, 1 Vern. 100; of course, whatever it would have been incompetent for him to have done in the way of revocation in his lifetime, it will be equally incompetent for him to attempt by will: *Bolton* v. *Bolton*, 3 Swans. 414; but see *James* v. *Bydder*, 4 Beav. 600. Between two voluntary conveyances, the first in date will be preferred: *Waters* v. *Bailey*, 2 Y. & C. C. C. 219; *Roberts* v. *Williams*, 4 Hare, 130.

Under the second head, viz. where the instrument is incomplete, it may be laid down in the words of Lord Thurlow, in *Colman* v. *Sarel*, 3 B. C. C. 12, that "wherever a voluntary deed is not sufficient to pass the subject out of the conveyer, there it never can be carried into execution." The distinction has prevailed and been recognised ever since, between executed and executory voluntary conveyances. In the case of *Wycherley* v. *Wycherley*, 2 Eden. 177, Lord *Northington* says, "I know no instance where a Court of equity has compelled a man to execute a mere act of volition." A Court of equity then will not aid a party seeking to effectuate an executory voluntary trust, either against the author of the imperfect gift or his representatives: *Ellison* v. *Ellison*, 6 Ves. 656; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84; *Colyear* v. *The Countess of Mulgrave*, 2 Keen, 81; *Burrows* v. *Greenwood*, 4 Y. & C. 251. This doctrine has been held equally applicable to the case of a party seeking the assistance of a Court of equity, to relieve himself from the consequences (of what in the case of an executed conveyance, we have seen he could not have done, *Petre* v. *Espinasse*,) of an imperfect attempt to bind himself, where the provisions of the instrument remained in fieri: see *Beatson* v. *Beatson*, 12 Sim. 281: for wherever a gift is intended, but not perfected, it can never be made effectual and converted into a declaration of trust, so as to constitute the donor a trustee for the donee: *Antrobus* v. *Smith*, 12 Ves. 39; *Edwards* v. *Jones*, 1 M. & C. 226. In conformity with the principles above laid down Lord *Cottenham* decided the case of *Dillon* v. *Coppin*, 4 M. & C. 647, where a person, by deed poll, attempted to transfer India Stock and shares in the Globe Insurance Company, which was an ineffectual mode of transfer, and it was held that the object of his intended bounty could not after the death of the author of the deed enforce the execution, of what undoubtedly was his intention, by having the stock and shares delivered to him; see also *Searle* v. *Law*, 15 Sim. 95; *Ward* v. *Audland*, 8 Beav. 213. The distinction between a complete and an

incomplete execution, in a voluntary settlement, with the consequences arising therefrom respectively, was clearly illustrated in the case of *Jefferys* v. *Jefferys*, 1 Cr. & Phil. 138; where a father, having by a voluntary settlement, conveyed freeholds, and covenanted to surrender copyholds in trust for his daughters, afterwards devised away a portion of the same estates; and the devisee being admitted into the copyholds, it was held, that although the daughters had an equity to have the trusts of the settlement carried into effect so far as related to the freeholds, yet that their title to the copyholds being incomplete could not be enforced against the devisee who had been admitted.

The slightest circumstance will be laid hold of in the consideration of the efficacy of the settlement against the volunteer: thus, in the case of *Meek* v. *Kettlewell*, 1 Hare, 464, Sir *J. Wigram* decided that where a party entitled to a contingent reversionary interest in monies, standing in the names of trustees, by deed conveyed certain portions of such monies to her son-in-law without notice to the trustees, such deed was not obligatory upon the settlor, on the ground that the legal interest had not been effectually conveyed, and that a subsequent conveyance for value, coupled with notice to the trustees, would undoubtedly have prevailed, on the authority of the cases of *Dearle* v. *Hall*, 3 Russ. 1; *Loveridge* v. *Cooper*, ib. 30.

The only cases which seem, or rather are reputed, to be inconsistent with the uniformity of the doctrine as established in the cases already adverted to, are those of *Sloane* v. *Cadogan*, reported in the Appendix to 3 Sugd. V. & P. No. 27; *Fortescue* v. *Barnett*, 3 M. & K. 36; and *Ellis* v. *Nimmo*, Lloyd & Goold, temp. Sugd. 333. The first case, *Sloane* v. *Cadogan*, cannot fairly be said to oppose the doctrine above laid down, as in that case there was no attempt to seek the aid of the Court to compel either the donor or his representatives to perfect an imperfect gift; there a son had, by a voluntary deed, assigned property in which he had a vested interest to trustees in trust for his father; and the decision of the Master of the Rolls, Sir *W. Grant*, turned upon the question of fact, whether or not there actually subsisted the relation of trustee and cestui que trust; and the conclusion arrived at by the learned judge was that the relation did exist, and that the trust had been executed; in the case of *Fortescue* v. *Barnett*, it was decided that the trustee of a policy of assurance which had been voluntarily assigned might enforce the renewal of it against the assignor who had suffered it to drop, although no notice of the assignment had been given to the insurance office; but it is to be observed that, in the opinion of Sir *J. Leach*, the gift of the policy was perfectly complete without delivery; nothing remained to be done

by the grantor; and the omission of the trustee to give notice of the assignment to the insurance company could not affect the cestui que trust, or vitiate the effect of the gift; he observed, that "There is a plain distinction between an assignment of stock where the stock has not been transferred, and an assignment of a bond. In the former case, the material act remains to be done by the grantor, and nothing is in fact done which will entitle the assignee to the aid of this Court, until the stock is transferred; whereas the Court will admit the assignee of the bond as a creditor:" 3 M. & K. 43. And in *Ellis* v. *Nimmo*, a post-nuptial agreement for a settlement was enforced against the father of the wife, as being founded upon a meritorious consideration, Sir *E. Sugden* admitting that there was no precedent for his decision. This case was reheard by Lord *Plunket*, and though he arrived at the same opinion, and decreed a specific performance, yet it is said that he decided it upon other grounds; possibly, that of an ante-nuptial agreement, which at the original hearing the plaintiff had endeavoured to substantiate.

One other point connected with the subject of voluntary deeds has been established by a series of authorities, and may now be regarded as a settled rule in equity, that where a voluntary deed is proved to have been executed and delivered, neither the retaining it in the hands of the settlor nor the absence of communication respecting its contents to the trustees and cestui que trust will invalidate it: *Sepalino* v. *Twitty*; *Boughton* v. *Boughton*, 1 Atk. 625; *Worrall* v. *Jacob*, 3 Mer. 256; *Sear* v. *Ashwell*, 3 Swanst. 411; *Doe d. Garnons* v. *Knight*, 5 B. & C. 671; *Exton* v. *Scott*, 6 Sim. 31; *Hall* v. *Palmer*, 3 Hare, 532; *Fletcher* v. *Fletcher*, 4 Hare, 67. Where the trust has been effectually created, the refusal of the trustee, after the death of the settlor, to sue at law upon the covenant will not prejudice the right of the cestui que trust to recover payment of the amount covenanted to be paid out of the assets of the deceased settlor: *Fletcher* v. *Fletcher*, 4 Hare, 67; see page 78.

——— *v.* DU RHONE.

July 11, 1729.

[CHANCELLOR.]

Where the same hand is to pay which receives, it is an actual payment.

A. AND B. were two merchants who had running accounts with each other; A. buys African stock in trust for B., afterwards B. agrees to give A. 200*l.* to take * 3000*l.* stock [* 77] at 175*l.* per cent., to be paid six months after; B. being considerably indebted to A., A. makes B. debtor in his book for the 200*l.*, but does not give him credit for the 5250*l.*, which was what the stock amounted to. A. has a statute of bankruptcy taken out against him; then comes the statute for registering all contracts made in the year 1720, in part or in the whole unperformed.

Question was, whether this 5250*l.* should be allowed in the account of B. as against the assignees.

Chief Justice *Raymond*, and Baron *Cummings*, assisting the Chancellor,

It was determined that this case was not within the statute for registering contracts; for it was a contract executed and performed; for B. being indebted to A. at that time, the money for which the contract was shall be looked on as paid, and be an actual discharge; so it is in all cases where the same hand is to pay which is to receive; it is eo instante a payment. Hob. 10, *Fryer* v. *Gildridge*; and so it would be at law; here no entry is made in his book, but no advantage shall be taken of that; for what he should have done, will in equity be looked on as done.

It has been attempted to be differenced by his becoming a bankrupt; but the law is very clear, that the assignees are exactly in the same place as the bankrupt, and stand in

his place to every particular, and any agreement entered into shall bind them; and though there may not be the same remedy against them, that is not from the nature, but the necessity of the thing; for he shall make an adequate and complete satisfaction, as far as his fortune will admit of in the hands of the assignees.

The case of —— v. *Du Rhone* suggests the consideration, first, of that general principle, viz. that what ought to have been done equity will regard as done, commented on ante, *Edwards* v. *Heather*, in notis, page 14; and, secondly, it serves to exemplify the doctrine of set-off, which flows from the above principle.

Although Courts of law have a concurrent jurisdiction in cases of set-off with Courts of equity, yet the relief in the latter is of much more ancient date and embraces a wider scope. For, until the 2nd of Geo. II. c. 22, where there existed cross demands unconnected with each other, a defendant could not, in a Court of law, defeat the action by proving that the plaintiff was indebted to him even in a larger sum than that for which he was sued.

The leading case on this subject in equity is that of *Jeffs* v. *Wood*, 2 P. Wms. 128; there a testatrix bequeathed a sum of money to one who was indebted to her at the time of her death, and who subsequently became bankrupt; and it was held that neither the bankrupt nor his assignees could claim the legacy without satisfying the debt. In order, however, to give a right to set off in equity there must be existing at one and the same time mutual demands, debts, and credits: *Cherry* v. *Boultbee*, 4 M. & C. 442. There must be a privity in respect of the claims, or there must be a right by contract; where neither of these requisites exists, there the jurisdiction as to set-off fails; thus, the devisee of an equity of redemption, to whose testator the mortgagee had bequeathed a life estate in the interest payable in respect of the mortgage, was not allowed to set off what was due to his testator in respect of the annual interest on the mortgage against the amount due from him (the devisee) in respect of the arrears of interest on the same mortgage, although it would have been perfectly competent for his testator to have done so: *Pettat* v. *Ellis*, 9 Ves. 563. So the executors of a testator, to whom an uncertificated bankrupt was indebted, cannot retain a legacy bequeathed to such bankrupt in satisfaction of a debt owing by him to their testator: *Cherry* v. *Boultbee*, 4 M. & C. 442: for the debt and legacy

were never co-existent; the debt, upon the bankruptcy was liable to be wiped off without the payment of any portion of it, whereas the legacy was wholly independent of the debt, and took effect from the death of the testator, at which time the certificate might have been obtained, and then it is clear that the executors could not have retained the legacy against the bankrupt: so neither can they against his assignees, before he obtains his certificate. So, where, at the date of the bankruptcy of a banking house, a mercantile firm was indebted to it on a balance of account; but the banking house was indebted to one of the members of the mercantile firm on his separate account, and he, by writing, desired that the joint debt might be satisfied by an appropriation of the sum due to him on his separate account; it was held that such claim could not be sustained: *Watts* v. *Christie*, 11 Beav. 546. Where however a legatee of one-fourth of the residue, being himself indebted to the executor, induced him to appropriate a part of the residue by way of loan, to secure which he had executed a warrant of attorney, and deposited the title deeds of certain leasehold estates, and then became bankrupt, it was held that the executors had a right to look to that portion of the testator's estate which they had sold out for the benefit of the bankrupt: *Ex parte Makins*, 2 M. D. & D. 508.

The mere pendency of an account, from which a cross demand may arise, is not a ground of set-off, so as to entitle a plaintiff to an injunction to restrain execution on a judgment which has been obtained upon a note given for a balance upon a former settlement: *Preston* v. *Stratton*, Anst. 50: nor, after a verdict for a breach of contract, can the party against whom the verdict was given assert a right in equity to prevent the recovery of the sum awarded against him, on the ground that there was an unsettled account between him and the plaintiff at law: *Rawson* v. *Samuel*, Cr. & Phil. 172: for a debtor cannot withhold payment of a debt, which by law and in honour he ought to have paid long since, merely by saying his creditors' securities for another unconnected debt will be found, upon accounts being taken, to exceed the amount of that other debt: *Gordon* v. *Pym*, 3 Hare, 223. On the same principle, the executors of one of several tenants in common were held not entitled to resist payment of a legacy to another tenant in common, on the ground that the latter was the sole occupant of the premises, and as such was indebted to the testator for his proportion of the rent in a sum exceeding the legacy, for there was no primâ facie accountability, and no right by contract was asserted, *M'Mahon* v. *Burchell*, 2 Phil. 127: so, also, where the executors of a mortgagee filed their bill to foreclose, the mortgagor was not permitted to resist the foreclosure, on the ground

that the mortgagee had been one of his two trustees, and that in respect of the trust account there was a balance in favour of the mortgagor; but inasmuch as the trust estate itself was the subject of the mortgage, the Court staid the foreclosure until the accounts sought were taken, on the condition, however, of the mortgagor bringing into Court the amount of the mortgage money: *Dodd* v. *Lydall*, et e contra, 1 Hare, 333.

We have seen that where the right has once existed it may be asserted, even in opposition to the Statute of Limitations, 21st of James I. c. 16, which only bars the remedy, but does not extinguish the right. Thus, where a legatee, whose debt to the testator was barred by the above statute, filed a bill for the payment of the legacy after the period when his debt was so barred, it was held that the executor might retain the amount sufficient to satisfy the debt: *Courtenay* v. *Williams*, 3 Hare, 539.

With respect to "mutual credits," under the various statutes relating to bankrupts, the reader is referred to the case of *Rose* v. *Hart*, and the note thereto in the 2nd vol. of Mr. Smith's Leading Cases, page 172.

DUFFIN *v.* FURNESS.

July 14, 1729.

[AT THE ROLLS.]

Money given by a person just before his death, not fraudulent to creditors.

A MAN, being much in debt, six hours before his decease gives 600*l.* for the benefit of younger children; this is not fraudulent as against creditors; tho' it would have been so of a real estate, or chattel real; tho' the Court would not have taken it to be so pro confesso, but would have directed an issue to try it; and so it was done in Lord *Sommers's* time, and on issue directed, determined fraudulent before Lord C. J. *Holt*.

Vide *Proctor* v. *Warren*, post in notis, next case.

* PROCTOR *v.* WARREN. [* 78]

De Term. Sanct. Mich. October 25, 1729.

[CHANCELLOR.]

A man has a term originally transferred to his daughter-in-law, and after grows indebted, this shall not be fraudulent as to debts after contracted.

A. HAVING leases for years, in consideration of the surrender of which, and a fine of his own proper money by him paid, had leases for years made to himself for life, remainder to his wife for her life; remainder as to one of the terms to his daughter; remainder of another of the terms to his daughter-in-law; this was done in the year 1717, (at which time money was owing to his daughter-in-law, which he received,) and after, in the year 1723, he enters into a bond, and died without assets.

It was insisted, this was assets, and voluntarily settled, as a citizen of London may in his life-time give away what he pleases, and the custom will not affect it; but if he makes a settlement, reserving an estate for life, or an interest to himself, this will be fraud as to the custom.

To which it was answered, that the cases are by no means parallel; that on the custom must be clearly fraud, for it is a settlement made by a freeman to take place after his death, at which time the custom must attach; which must be in fraud of the custom, to prevent its operation, for he could not do it by will, and this would be doing it in another shape, and the persons intitled to it had a right to it at that time; but this is done six years before a debt contracted; if a debt had been then contracted, might have been another consideration, or if he had after sold this estate; the question is now not between purchasers, but creditors. But even suppose this had been a real estate voluntarily settled, and he had after entered into a *bond, a [* 79]

Court of equity would not have assisted that bond against the settlement; this cannot be in fraud of a debt after contracted.

Lord Chancellor.—It would be very extraordinary to subject this to debts not then contracted; but I do not know that it has ever been determined, that a man indebted, minding to provide for his children, has an estate originally conveyed to them, that that should be subject to
Prec. C. 22. debts. But that is not the present case, for here is proof that this daughter had money owing to her, which was paid to the father-in-law.

So not made subject to debts.

By the 2nd sect. of 13th Eliz. c. 5, which was enacted for the purpose of defeating all fraudulent alienations of property made by the owners to avoid the debts of others, it is declared, that "all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease-rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution at any time had or made since the beginning of the queen's majesty's reign that now is or at any time hereafter to be had or made to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, executors, successors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guileful, covinous, or fraudulent devices and practices as is aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate, and of none effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding."

It has been observed by Lord *Hardwicke*, on the construction of this statute, that "Considerations are not to be weighed in too nice scales:" *Fitzer* v. *Fitzer*, 2 Atk. 514. And in a recent case it has been decided, that a deed apparently voluntary may be supported by collateral evidence showing a contract for value; *Pott* v. *Todhunter*, 2 Coll. 76, 82; where Sir *J. Knight Bruce* observes, "A case to be brought within that description of

cases in which instruments of this nature are held void must contain two ingredients, an appropriation of the party's own property, and a voluntary act in making that appropriation." In addition to the above ingredients, if it is sought to invalidate any settlement in favour of creditors, one or other of the following circumstances must occur—either that the settlor shall have been indebted to the extent of insolvency at the time of the execution of the settlement; *Lush* v. *Wilkinson*, 5 Ves. 384 ("a single debt will not do; every man must be indebted for the common bills for his house, though he pays them every week," ib. 387); or that it shall be satisfactorily proved that it was executed by the settlor with a view to his becoming indebted at a future time: *Stileman* v. *Ashdown*, 2 Atk. 477, 481; *Richardson* v. *Smallwood*, Jac. 552; *Holden* v. *Hearn*, 1 Beav. 445; *Harries* v. *Lloyd*, 6 Beav. 426. In short, to invalidate such a settlement, it must be proved not only to have been voluntary, but also fraudulent: *Russel* v. *Hammond*, 1 Atk. 13, 15.

Where there is not satisfactory evidence that the party who made the voluntary settlement or gift was at the time in circumstances beyond suspicion, a Court of equity will grant to the parties impugning the settlement liberty to try its validity by an action at law: *Duffin* v. *Furness*; *Townsend* v. *Westacott*, 2 Beav. 340. It is unnecessary to show that the insolvent's debts exceeded his assets at the time; *De Tastet* v. *Le Tavernier*, 1 Keen, 161; but a plaintiff seeking to set aside a settlement as fraudulent ought to be, and by his bill to allege that he was, a creditor at the time of the settlement; for a deed can only be set aside as fraudulent against creditors at the instance of a person who was a creditor at the time, though when it shall have been set aside subsequent creditors may be let in: *Walker* v. *Burrows*, 1 Atk. 93; *Kidney* v. *Coussmaker*, 12 Ves. 136; *Battersbee* v. *Farrington*, 1 Swanst. 106; *Ede* v. *Knowles*, 2 Y. & C. C. C. 172.

A contingent debt, though become absolute after the execution of the deed sought to be impeached, is sufficient to postpone it. Thus, where A. covenanted to pay a sum of money to B., his intended wife, if she survived him, and then made a settlement upon another, B. would have a clear right to impeach the latter settlement; *Rider* v. *Kidder*, 10 Ves. 360; but the settlement will only be void to the extent that it may be necessary to deal with the subject of it for the satisfaction of the creditors: *Curtis* v. *Price*, 12 Ves. 103. It will make no difference if the subject of the voluntary alienation is a chose in action, provided either that the debtor of the chose in action be dead or the assignor has become insolvent; for in the former case the creditors of the assignor, in the latter the official assignee, may avoid the transaction: *Norcutt* v. *Dodd*, Cr. & Phil.

100. It is not enough in order to invalidate a post-nuptial settlement by the heir of one indebted by specialty merely to allege these facts; mala fides must have existed, and must be specially put in issue and proved, before the claims of the specialty creditor is preferred; *Richardson* v. *Horton*, 7 Beav. 112; and though, doubtless, it is competent for any one creditor to defeat a prior voluntary settlement by a subsequent conveyance for value, yet there is no authority for extending this power to the heir of the settlor, qua heir: see *Parker* v. *Carter*, 4 Hare, 400, 409.

Where a person gives a warrant of attorney to his creditor for the purpose of securing a debt, and at the same time is conscious that his assets are inadequate for the payment of all his debts, this is a sufficient proof of a fraudulent preference to avoid the transaction under the provisions of the 1st section of the 13th Eliz. c. 5; *Twyne's case*, 3 Rep. 80; if the warrant of attorney or bond is only to be operative "when misfortunes should happen" to the grantor or obligor, the only difference is that the fraud is more manifest: Wise, ante, 46.

With respect to the extent and force of the word "indebted," the following review of the authorities bearing upon the subject, by Lord *Cottenham*, in the recent case of *Skarf* v. *Soulby*, 1 Mac. & Gor. 364, are well worthy of an attentive consideration.

"The word 'indebted,' as used by Lord *Hardwicke*, in *Lord Townshend* v. *Windham*, 2 Ves. 1; in *Russel* v. *Hammond*, 1 Atk. 13; and in *Walker* v. *Burrows*, 1 Atk. 93; cannot be considered as meaning only that the settlor owed *some* debts. In the latter case he refers to the statute 13 Eliz., and says the settlement must be 'to the end, purpose, and intent to delay, hinder, or defraud creditors.' It was held, accordingly, by Lord *Kenyon*, in *Stephens* v. *Olive*, 2 Bro. C. C. 90, that a debt secured by mortgage, though due at the time of the settlement, did not invalidate it. The existence therefore of property at the time of the settlement, not included in it, ample for the payment of debts then due, would negative the fraudulent intention. In *Lush* v. *Wilkinson*, 5 Ves. 384, Lord *Alvanley* said, that insolvency was necessary; and in *Richardson* v. *Smallwood*, Jacob, 552, Sir *Thomas Plumer* said, that it was not necessary to prove insolvency if the settlor was largely indebted, the question being the intention to defraud creditors. In *Townsend* v. *Westacott*, 2 Beav. 340, Lord *Langdale* put the rule upon its true principle, holding that it was not necessary to show insolvency, but that the mere evidence of some debt at the time of the settlement was not sufficient. In the case before me, there is no proof of debt at the time of the settlement, unless the I O U for 200*l.*, dated the 2nd April, 1841, and now produced by the plaintiffs, be considered as es-

tablishing the fact; but, if so, it could only prove 200*l.* due, and not the state of the settlor's affairs. But this document is not stated in the bill; nor is there any allegation that the plaintiff's debt, to which it is supposed to relate, was due at the date of the settlement; and the defendants could not possibly have been prepared with any proof affecting the document. It is, therefore, impossible to support a decree upon such evidence; and the only doubt I have had is, whether I ought to dismiss the bill or to direct inquiries. In *Lush* v. *Wilkinson*, Lord *Alvanley* (there being no conclusive evidence) dismissed the bill, giving leave to file another. In *Kidney* v. *Coussmaker*, 12 Ves. 136, Sir *W. Grant* directed inquiries, there being no evidence, because the plaintiff had not had a proper opportunity of impeaching the settlement. In *Richardson* v. *Smallwood*, Sir *T. Plumer* adopted the same course, although the plaintiff had attempted to prove the debt; and, in *Townsend* v. *Westacott*, Lord *Langdale* directed inquiries, the evidence of the debt being only admissions of the settlor and not evidence against those claiming under the settlement. If I were to dismiss this bill, any other creditor might raise the question in another suit, so that the effect would only be unnecessary expense and delay, and the I O U, though, under the circumstances, not affording proof upon which any judgment ought to be founded, may well, if it were necessary, lay the foundation for inquiry."

A reference was accordingly directed to inquire what debts were owing by the settlor at the time of the execution of the settlement, and at his death, and what at the time of the settlement was the amount of the settlor's property not included in the settlement.

CLAVERING *v.* CLAVERING.

Nov. 10, 1729.

[CHANCELLOR.]

Mines different from pits. May sink in pursuit of the oar; aliter of pits.

IN this case it was said by the Solicitor-General, that there was great difference between pits and mines; for if a mine be opened, as one may work the mine, is not obliged to

pursue the vein of oar under ground; but may sink pits in pursuit of it, as many as he thinks proper, which be necessary to come at the oar; and so the Lord Chancellor said it had been resolved before Justice *Powel*, on great consideration, and consulting and examining the most able miners.

By the first resolution in *Saunders's case*, 5 Coke, 12 *a*, which is the leading authority on the subject of mining rights, it is laid down, that "if a man hath land, in part of which there is a coal mine open, and he leases the land to one for life or for years, the lessee may dig in it; for, inasmuch as the mine is open at the time, &c., and he leases all the land, it shall be intended that his intent is as general as his lease is; *scil.* that he shall take the profit of all the land, and by consequence of the mine in it. 2ndly, If the mine were not open, but included within the bowels of the earth at the time of the lease made; in such case, by leasing of the land, the lessee cannot make new mines, for that shall be waste. 3rdly, If a man hath mines hid within his land, and leases his land and all mines therein; there the lessee may dig for them, for quando aliquis aliquid concedit, concedere videtur et id sine quo res ipsa esse non potest; and therewith agrees 9 Ed. IV. 8; where it is said, that if a man leases his land to another, and in the same there is a mine, (which it is to be intended of a hidden mine,) he cannot dig for it; but if he leases his land, and all mines in it, then, although the mine be hidden, the lessee may dig for them; and by consequence, the digging of the mine in the principal case, was waste in the first lessee. 4thly, It was resolved, that although the mine was first opened by the first lessee, yet if his grantee dig in it, it is waste in him."

If the mine be already open, the working it is part of the annual profits; but if unopened it is part of the inheritance, and cannot be enjoyed by a tenant for life (see *Whitfield* v. *Bewit*, 2 P. Wms. 242), except by express words: for as observed by Lord *Langdale*, "a tenant for life has no right to take the substance of the estate by opening mines or clay pits; but he has a right to continue the working of mines and clay pits, where the author of the gift has previously done it, and for this reason, that the author of the gift has made them part of the profits of the land:" *Viner* v. *Vaughan*, 2 Beav. 466, 469.

The point, however, which is decided in *Clavering* v. *Clavering*, is that in pursuit of the ore, new shafts or pits may be opened for the

purpose of working the old mine. It seems to be still an unsettled point, whether in the case of mines or pits once opened, but abandoned, or in the case of such mines or pits which were about to be opened by the author of the settlement, it is competent for the tenant for life either to recommence the working of the one, or prosecute the inchoate act of the other: and where there is any doubt as to the state of the mines when they fell into the possession of the tenant for life, that question must be ascertained at law, and an injunction will be granted in the mean time to restrain the working until the right is legally established: *Viner* v. *Vaughan*, 2 Beav. 466. In the case of *Ferrand* v. *Wilson*, 4 Hare, 344, 388, a tenant for life was held entitled only to get so much stone from quarries on the settled estate as was necessary for repairs or buildings on the property, and under no circumstances was he to be at liberty to open or work any mines of coal or minerals not opened or in work at the death of the testator.

[* 80] * EVLYN *v.* EVLYN.

De Term. Sanct. Mich. October 26, 1730.

[CHANCELLOR.]

Remainderman not to have the personal estate exonerate the real.

HÆRES natus, or factus, may have the personal estate applied in exoneration of the real, but not a remainderman; for the first comes to discharge the estate which descended to him, or was given him by the same person who owned both real and personal estate; but in the other case the remainderman is a stranger, and does not claim the estate from the same person who owned the personal estate.

The facts of this case, as reported in 2 P. Wms. 659, are these:—an ulterior remainderman in tail sought to throw upon the personal estate of a preceding tenant in tail the amount of a charge which the author of the settlement had imposed upon the lands; it was held that he (the ulterior remainderman) had no equity to dissociate the burden from the benefit, and that the primary liability to make good the charge was on the estate. The estate having been expressly charged with the amount in question, was a sufficient reason for exempting the personalty either of the author of the settlement, or à fortiori of the person taking a preceding limited interest in the premises, even although he should have discharged the incumbrance; for the presumption is, that the charge did not merge in the inheritance, but was kept alive for the benefit of the representative of the person so discharging: *Faulkner* v. *Daniel*, 3 Hare, 199, 217. This principle was further recognized in a case where the contest was between the personal representative and the heir of the devisee of the incumbered estate, who was also the residuary legatee; there Sir *J. Leach* in effect observed, that if the devisee had thought fit she might have paid off the mortgage out of the personalty bequeathed, and it may therefore be

said that she elected to continue the mortgage as a charge on her real estate; the mortgage debt was not her debt, and her heir therefore has no equity to pay off this mortgage out of her personal estate: *Scott* v. *Beecher*, 5 Madd. 98; see also *The Earl of Clarendon* v. *Barham*, 1 Y. & C. C. C. 688.

In the case of a mere mortgage it is clear that the heir or devisee of the mortgagor has primâ facie an equity to cast on the personal estate of the mortgagor that which is in fact only the personal debt of the mortgagor, and that for which the land was only a collateral security, but this is the case only where the debt is one which is payable by the executors at law, and without prejudicing other debts or legacies: *Tweddell* v. *Tweddell*, 2 Bro. C. C. 101. Where the real estate is from the nature of the contract primarily liable, as where a man purchases an equity of redemption and dies, his personal estate shall not be applied for the benefit of his heir, inasmuch as it was not the ancestor's debt: *Pockley* v. *Pockley*, 1 Vern. 37; nor for the benefit of a devisee; *Barry* v. *Harding*, 1 Jones & Lat. 475.

HARVY *v.* WOODHOUSE.

Oct. 27, 1730.

[CHANCELLOR.]

A. who had confessed a judgment to B. in trust for C. sells; B. makes A. executor, whereby cannot recover at law; equity will not assist against the purchaser.

A. ENTERS into a judgment to B. and C., which is defeasanced to the use of D., and in the defeasance A. covenants for himself, and his heirs, to pay to D., the cestui que trust, and her heirs; afterwards A. sells part, and the other part descending to the heir, he married and had children; B., one of the trustees, dies; C. the surviving trustee makes A. the conusor of the judgment executor; D., the cestui que trust, brings bill against the executors of A., the heir at law and the purchaser, for relief, not

being able to recover at law, the conusor being made executor; but no relief.

CHANCELLOR.—Tho' it be a mere accident and slip, that by the conusor's being made executor, yet equity will not interpose or give any assistance to affect a purchaser; recover at law as you can.

The title of a purchaser for value without notice, is one which has always claimed the especial favour and regard of Courts of equity; *Sir John Burlace* v. *Cooke*, Free. Ch. 24. Though the extent to which the privileges attaching on such a title has been somewhat modified, by a few succeeding authorities, yet the doctrine to be extracted from the case of *Harvy* v. *Woodhouse* may now be said to be enlarged, rather than qualified by the more recent decisions.

Lord *Nottingham*, who decided the case of *Burlace* v. *Cooke*, was himself the first to introduce the distinction that the plea of a purchase for value without notice was a bar only to an equitable claim, and inapplicable to the case where the plaintiff has the legal title: *Rogers* v. *Seale*, Free. Ch. 84. The principle of this distinction was followed by Lord *Thurlow*, who decided against the validity of such a plea, where a dowress brought her bill to set out dower; *Williams* v. *Lambe*, 3 Bro. C. C. 264; and was again recognised by Sir *John Leach* in the case of *Collins* v. *Archer*, 1 Russ. & M. 284, who held that where a mortgagee of tithes being also the occupier of the lands out of which the tithes issued, pleaded that he had advanced his money without notice of any prior incumbrance; such a plea was no defence against the title of a plaintiff, who by a previous demise of the same tithes had become the legal owner of them.

These decisions, however, are opposed by various authorities, and first by the case of *Parker* v. *Blythmore*, 2 Eq. Ca. Abr. 79, pl. 1, where Sir *J. Trevor*, M. R., held that the plea was equally available against a legal as an equitable claim, and it is remarkable that that case does not appear to have been cited before Lord *Thurlow* in *Williams* v. *Lambe*.

A Court of equity will rather assist than disarm an innocent purchaser without notice: *Jerrard* v. *Saunders*, 2 Ves. jun. 454. "I have," says Lord *Eldon*, "honestly and bonâ fide paid for this in order to make myself the owner of it, and you shall have no information from me as to the perfection or imperfection of my title until you deliver me from the peril in which you state I have placed myself in the article of purchasing bonâ fide:" *Wallwyn*

v. *Lee*, 9 Ves. 24, 33. The title of such a purchaser has been aptly described by Lord *Loughborough* as "a shield to the possession:" *Strode* v. *Blackburne*, 3 Ves. 221, 225. In accordance with this view Lord *Abinger*, in the case of *Payne* v. *Compton*, 2 Y. & C. 461, observed, that if a party "were a purchaser for a valuable consideration without notice, that would protect him against any claim by the owner of the legal estate," and à fortiori against a claim which to be enforced requires the aid of a Court of equity to clothe it with the legal title; thus where a recovery had been imperfectly suffered and the remainderman had got possession of the estate and sold it for valuable consideration, Lord *Hardwicke* refused to amend the mistake to the prejudice of the purchaser, though as against the remainderman alone the plaintiff would have been relieved: *Bell* v. *Cundall*, Ambl. 101.

In conformity with the opinion expressed by Lord *Abinger*, in *Payne* v. *Compton*, is that of Sir *Edward Sugden*, who very recently, in the case of *Bowen* v. *Evans*, 1 Jones & Lat. 178, 264, laid it down that "whether the purchaser has the legal estate or only an equitable interest, he may by way of defence avail himself of the character of a purchaser without notice, and is entitled to have the bill dismissed against him, though the next hour he may be turned out of possession by the legal title:" S. P. *Joyce* v. *De Moleyns*, 2 Jones & Lat. 374.

It is submitted that the protection in equity ought not to be founded on the technicality of the plaintiff's or defendant's title (the accident of its being legal or equitable); but on the fact that the defendant is the innocent and honest purchaser of a title, which under the circumstances a Court of equity declines to impeach.

Where a party purchases for value and without notice, and then sells to another who has notice, the latter may shelter himself under the first purchaser: *Brandlyn* v. *Ord*, 1 Atk. 571; *Lowther* v. *Carlton*, 2 Atk. 242; *Sweet* v. *Southcote*, 2 Bro. C. C. 66. On this principle an unwilling purchaser from a mortgagee who had a power of sale was forced to complete his purchase, although he had had formal notice that the transaction, out of which the mortgagee had exercised his power of sale, was fraudulent: *Green* v. *Pulsford*, 2 Beav. 70. Where there have been divers mesne assignments it matters not that the first or any succeeding or the ultimate purchaser had notice, provided it is shown that any one intermediate purchaser had bought for value and without notice, and the reason is obvious, for to hold the contrary would be to decree that the innocent purchaser should keep the estate for ever: *Harrison* v. *Forth*, Pre. Ch. 51.

It must be borne in mind that the grounds on which relief was not accorded in the case of *Harvy* v.

Woodhouse, was that the defendant had in conscience a right equal to that claimed by the plaintiff, and not because the debt or obligation had been released by reason of the appointment of the obligor as executor; for though at law such would have been the result of the appointment (*Wankford* v. *Wankford*, Salk. 299) it has no such operation in equity: *Errington* v. *Evans*, 2 Dick. 456.

[*81] * JACKSON *v.* JACKSON.

Nov. 4, 1730.

[CHANCELLOR.]

Livery supposed after great length of time.

A DEED of lands in two different counties by way of feoffment, and livery and seisin of the lands in one county indorsed; the deed was made 1657.

Decreed that tho' no livery appeared of the other lands, yet by reason of the possession, and great length of time, equity will suppose and supply it; it had been much stronger on the other side, had the livery been indorsed of lands in one county in the name of both; it would have been an implication that none was of the other, since one was designed for both.

In the case of *Jackson* v. *Jackson*, there had been a possession of seventy years; but it was insisted that as to the possession and length of time the intendment endeavoured to be made out from thence could have no weight; because the same persons who enjoyed the lands under the deed were also heirs at law, and as such must have enjoyed them otherwise, though there had been no such deed; yet the Lord Chancellor declared that were he to try this matter at law, he should presume and so direct that livery was executed as to all the lands according to the deed after this length of time; but, however, that this Court would aid a defect of this kind: 13 Vin. Abr. 207, tit. Feoffment, F. *a.* 11, 2nd ed.

Where the enjoyment of an

estate has been long and uninterrupted, there a strong presumption arises, both in Courts of law and equity, in favour of such a possession: *Cooke* v. *Cooke*, 2 Atk. 67. Where, however, the title is founded on the fact of the possession having originated in an entry under a term of years to raise a sum of money, there the presumption will be rebutted, and is in fact the other way: *Acherley* v. *Roe*, 5 Ves. 565. On this last principle it is, that where a tenant for life has committed waste or suffered any right of way or other privilege to be asserted over the inheritance for a period which, as against him if he were the absolute owner, would give the wrongdoer a statutable title, the remainderman will be unaffected: for it is always competent for a remainderman at any time within the statutable period after his remainder has attached either to bring his action of ejectment, or in the case of equitable waste to file his bill for compensation as against the estate of the tenant for life; *Kemp* v. *Westbrook*, 1 Ves. 278; *Duke of Leeds* v. *Earl of Amherst*, 2 Phill. 117.

ROGERS *v.* ROGERS.

De Term. Sanct. Trin. June 1 *&* 5, 1733.

[CHANCELLOR.]

A. by will made heiress and executrix to sell and dispose as thinks fit to pay debts and legacies; no resulting trust to the heir at law.

WILLIAM ROGERS makes his will in these words: "I do constitute and make my well beloved wife, Anne Rogers, sole and whole heiress and executrix of all my lands, tenements, goods and chattels whatsoever, real and personal, the same to sell and dispose of as she shall think fit, to pay my debts and legacies of this my last will and testament;" and gives the heir at law 5*l.* Question whether there be not a resulting trust to the heir at law, being said to be for a particular purpose.

[* 82] *To make it a resulting trust were cited 2 Chan. Ca. *Culpepper* v. *Austin*, 2 Vern. 425, 571, 644, and the case of *Lodder* and *Lodder*, 1733, which was this: John Lodder gave all his lands to his son Charles for ninety-nine years; remainder to trustees to preserve contingent remainders; remainder to his first and every other son in tail male; remainder to his son Francis, with the same limitations; and for want of such issue, to his kinsman Robert Lodder, and his heirs, in trust to pay all and every of his daughters 5000*l.* Makes no further disposition after raising the portions; this held a resulting trust to the heir at law, who was the daughter, and intitled to 5000*l.* after two estates-tail.

Lodder v. *Lodder.*

On the other side.

She is made sole heiress and executrix, so that she is

substituted in the room of him who actually is so; so that if there should be a resulting trust to the heir, by the word *pay*, yet she must have it, because by the will made heir. An heir at law is never considered as trustee; and here she is put in the place of one who is so; this is on a will, and the case of deeds and wills is very different; for there may be a resulting trust on a deed, for that imports a consideration, and the consideration is the occasion of making it, and can be for no more than is mentioned, the rest is undisposed; but on a will it is different; that does not imply consideration, but a benefit; and here he describes her with regard and affection, which plainly shows he intended her a benefit, which she could not have, if the construction of a resulting trust should take place; all the cases where it is a resulting trust, are, where a particular trust is declared, and not having disposed of the whole part remains, which must go to the heir: the case of *Culpepper* and *Austin*, 2 Chan. Ca. is on a deed, which does not import a bounty, as does a will; a use may arise, but not on a will: the case of *Lodder* v. *Lodder* was an express trust.

Decreed no resulting trust. The case in 2 Vern. 247, is in point; the resolution of which is in Equity Cases Abridged, 273.

The doctrine of resulting trusts may be considered under two heads: first, under what circumstances there shall be any resulting trust at all; and secondly, to what extent and in whose favour such trusts will be implied. The question whether there shall be a resulting trust or not resolves itself into one of intention. The "nicety of distinction" as to whether the devisee is to take beneficially, or as a trustee, is succinctly stated by Lord *Eldon* in the case of *King* v. *Denison*, 1 Ves. & Bea. 260, 272, where he says, "If I give to A. and his heirs all my real estate charged with my debts, that is a devise to him for a particular purpose but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise to him for a particular purpose, and nothing more." In the former case there

is a burden annexed to the interest devised, and thence the inference that the devisee takes beneficially, but subject to the particular purpose indicated; in the latter case the devise is for a particular purpose only, and the devisee is obviously nothing more than a bare trustee; when, therefore, the trusts are accomplished without exhausting the whole of the estate devised, the surplus, as will be hereafter seen, belongs to the heir.

The heir is in equity regarded with especial favour, and cannot be disinherited except by the most satisfactory evidence, yet the implication may be so strong against him from the words of the will itself as to rebut the presumption; *Rogers* v. *Rogers;* and so, very recently, where lands were devised to a stranger "upon the trusts and for the uses following," none of which were declared, and the devisee was personally saddled with an annuity for the benefit of the heir, this was held to amount to a sufficient indication of intention to exclude the presumption of a resulting trust in his favour: *Hughes* v. *Evans*, 13 Sim. 496; *Shaw* v. *M'Mahon*, 4 Dr. & War. 431. The mere fact of having provided a legacy for the heir is not of itself sufficient to rebut the presumption; *Randall* v. *Bookey*, 2 Vern. 425; *Starkey* v. *Brooks*, 1 P. Wms. 390; *Cruse* v. *Barley*, 3 P. Wms. 20; *Watson* v. *Hayes*, 5 Myl. & Cr. 125; nor any terms of endearment accompanying the legacy: *Wych* v. *Packington*, 3 Bro. P. C. 44, Tomlin's ed.

Before considering to what extent and in whose favour such trusts will be implied, it is to be observed, as was laid down by Lord *Nottingham* in his celebrated judgment in *Cook* v. *Fountain*, 3 Swanst. 592, that "the law never implies, and the Court never presumes a trust but in case of absolute necessity; the reason of this rule is sacred, for if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate, and so at last every case in Court will become casus pro amico."

The case of *Ackroyd* v. *Smithson*, 1 Bro. C. C. 503, though not the earliest authority upon the doctrine of resulting trusts, may nevertheless be regarded as the leading case upon this head of equity. It establishes the proposition that where either lands or personalty are given by will to trustees for a particular purpose which fails, the mere fact of the conversion of the land into personalty or vice versâ, will not alter the devolution of the property, or deprive the heir or the next-of-kin, of so much of the limitations as have failed, which in that case result in their favour respectively according as the nature of the property failing its original destination may indicate: see also the cases of *Hereford* v.

Ravenhill, 1 Beav. 481; *Salt* v. *Chattaway*, 3 Beav. 576; *Eyre* v. *Marsden*, 2 Keen, 564; *S. C.* 4 Myl. & Cr. 231; *Collis* v. *Robins*, 1 De G. & S. 131; *Fitch* v. *Weber*, 6 Hare, 145. This was the rule in cases of real estate previously to the late Wills Act, 1 Vict. c. 26, where there was a residuary devisee, because a devise of real estate was specific, and the devisee could only take such real estate as the testator was entitled to at the date of his will; *Collins* v. *Wakeman*, 2 Ves. jun. 683; *Cooke* v. *The Stationers' Company*, 3 Myl. & K. 262, in which case Sir *John Leach* observes that "where a real estate is directed to be sold, and the testator wills that a sum of 1000*l.* or any other sum of money shall be applied to a particular purpose, and the residue of the produce of sale only is given to A., and the particular purpose fails either by lapse or because it is void at law, then the heir and not A. will take the 1000*l.* or other sum of money, because the whole is real estate at the death of the testator, and A. can take no more of that estate than is expressly given to him, namely, the residue of the real estate after deducting the sum of 1000*l.* or other sum. . . . . Where real estate is not directed to be sold, and the residuary devise is not of the produce but of the *corpus* of the real estate, there the question arises between the heir at law and the devisee as to the intention of the testator. If the devise to a particular person, or for a particular purpose, is to be considered as intended by the testator to be an exception from the gift to the residuary devisee, the heir takes the benefit of the failure. If it is to be considered as intended by the testator to be a charge only upon the estate devised, and not an exception from the gift, the devisee will be entitled to the benefit of the failure."—Ib. p. 264; see also *Arnold* v. *Chapman*, 1 Ves. 108; *Pickering* v. *Lord Stamford*, 3 Ves. 492; *Johnson* v. *Telford*, 1 Russ. & M. 244; but by the 24th sect. of 1 Vict. c. 26, a will is to be construed to speak from the death of a testator, with reference both to his real and personal estate, unless a contrary intention shall appear by the will. A devise "of all real estates whereof I am *now* seised" is evidence of such contrary intention: *Cole* v. *Scott*, 1 Mac. & Gor. 518. In cases of legacies out of personalty the residuary legatee is regarded with similar favour where the legacy has failed, and, as observed by Sir *James Wigram*, "no rule of law can be better settled than this, that unless the legatee intended to be benefited by a particular bequest can be ascertained, the mere intention that the residuary legatees of a testator should not take will be inoperative:" *The Mayor, Aldermen, and Burgesses of Gloucester* v. *Wood*, 3 Hare, 131, 146.

The Crown has no equity to stand in the place of the heir at law, and cannot come into Chancery to assert for its benefit a resulting trust which the heir might have enforced;

Burgess v. *Wheate*, 1 Eden, 177; *Walker* v. *Denne*, 2 Ves. jun. 170, 185; nor has the lord of copyhold any such equity: thus, where there was a devise of copyholds upon condition that the devisee should pay thereout 2000*l.* to a charity, the conditional limitation being void under the Statute of Mortmain, and there being no heir, there was no resulting trust in favour of the king, nor of the lord, but the devisee took the lands discharged of the condition; *Henchman* v. *The Attorney-General*, 3 Myl. & K. 485; had it been pure personalty or leasehold, and had there been no next-of-kin, the Crown would have been entitled thereto as bona vacantia; *Middleton* v. *Spicer*, 1 Bro. C. C. 201; *Taylor* v. *Haygarth*, 14 Sim. 8.

We have seen that a Court of equity never presumes a trust but in case of absolute necessity; à fortiori, it will not enforce a secret trust where no such necessity exists: thus, where lands were devised to four persons on secret trust for the benefit of an alien, though in the will expressed to be for the benefit of the devisees themselves, and three of the devisees had by letter to the testator acknowledged the trust, the Court refused to make any declaration except that the lands were not subject to any trust; *Burney* v. *Macdonald*, 15 Sim. 6. Where certain premises had been conveyed to trustees on trust for the benefit of the settlor, and she by will devised the same to other trustees on trust to sell, and out of the proceeds to pay debts and legacies specified in a certain paper marked A.; on her death without heirs, the paper A. not being forthcoming, it was held, as between the trustees of the deed and those of the will, that the latter were entitled to a conveyance of the trust premises, although the trusts on which they were to hold the property were not capable of being ascertained: *Onslow* v. *Wallis*, 1 Mac. & Gor. 506.

A distinction is to be observed in the rule of construction with regard to resulting trusts arising from a failure in the disposition of a testator's real estate, and those arising from a failure in the disposition of his personal estate; thus, where lands are devised after the death of a particular individual, without any disposition of them during his life, and that individual happens to be a stranger, and the ulterior devise is to the heir of the testator, there the law by necessary implication confers on the stranger the enjoyment of the estate for his life; *Dashwood* v. *Peyton*, 18 Ves. 27, 40; but where the devise is to A. after the death of B., and both are strangers, there an intermediate resulting trust arises in favour of the testator's heir for the term of B.'s life; *Smarthill* v. *Schollar*, 2 Free. Ch. 458; *Davenport* v. *Coltman*, 12 Sim. 588; for the heir is not to be excluded by anything short of a necessary implication. Where, however, personalty is the subject of the bequest, the next-of-

kin are not regarded with the same favour in equity; the person for whose life the ulterior enjoyment of the bequest is postponed, being presumed to take the intermediate beneficial interest; *Roe dem. Bendale* v. *Summerset*, 5 Burr. 2608; *Blackwell* v. *Bull*, 1 Keen, 176; but where lands and money are given as a common fund for maintenance to a stranger, albeit the period of assignment and transfer is postponed to a future day, yet the intermediate interest of the land will not result in favour of the heir, nor will the Court separate what the testator has fused: *Genery* v. *Fitzgerald*, Jac. 468; *Ackers* v. *Phipps*, 9 Bli. N. S. 430. Aliter, where the testator has himself distinguished the property: *Watson* v. *Hayes*, 5 Myl. & Cr. 125; *Wills* v. *Wills*, 1 Dr. & War. 439.

THE TABLE

OF THE

PRINCIPAL MATTERS

(REPORTED IN THE TEXT).

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A woman entered into a bond, then married, and brought her husband a large fortune; the husband pays the interest on the bond during her life; the bond not being recovered during the life of the wife, the payment of interest which he was obliged to do, will not create an equity to charge him with the bond, [19], 65.

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Person made use of the process of the Court to get a person taken on an action; it is an abuse of the process of the Court, and a contempt; and ordered to procure his discharge or to stand committed, [64], 182.

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If a foreign Court has jurisdiction of the cause, and the persons are within it, their sentence is conclusive, [69, 70], 192.

COURT (ECCLESIASTIC).

A will was suggested to be burned, which was examined into in the Ecclesiastic Court; will not examine into it here, as they have jurisdiction, [49], 139.

COURT (INNS OF).

To determine their own disputes, [56], 161.

COVENANT.

Lease made by a dean and chapter, before the disabling statutes, with covenant on surrender to renew for ninety-nine years; bill brought to renew for forty. Covenant held entire, and would not decree: but reversed in the Lords, [66], 185.

CUSTOMARY RIGHT.

One tenant of a manor cannot bring bill to quiet him in customary right, which is common to the other tenants, [74], 203.

DEBTS.

A man mortgaged a copyhold estate, after devised for payment of debts; the interest after his death was paid, which was admission of assets, so not to be sold for payment of debts; but on a bill foreclosure ordered, [61], 174.

DECREE.

Where plaintiff has a decree nisi, and does not appear, his bill will be dismissed with costs, [6], 23, [50], 142.

DEEDS.

Deeds and writings to be delivered to the heir, on confirming jointure, [2], 6.

Heir entitled to have the deeds and writings produced before he is obliged to controvert the title of a will which defeats his right, *ib.*

DEPOSITIONS

Taken de bene esse shall not be published without affidavit that the party is dead, and could not have been examined in chief before his death, [11], 36.

Not read at the hearing of the cause, not to be read on appeal to the Lords; aliter on a rehearing, [21], 71.

A person was made defendant, struck out and examined; whether his depositions to be read, [41], 112.

DEVISE

To A. and B., the survivor and survivors of them, their heirs and assigns, to be equally divided between them, share and share alike; this is a joint tenancy for life, with different inheritances, [17], 59.

To a papist under the age of eighteen; he may conform at any time under eighteen and a half, to prevent the disability created by 11 & 12 Will. III. c. 4, [22], 73.

EAST INDIA COMPANY.

By the conditions of their sales, a discount of 6½ per cent. is to be allowed, if the goods are taken away in a certain time; and if not taken away within another prescribed time, the goods to be resold, and the deficiency, if any, to be made good to the Company: on the second sale, the discount will be a charge on the first buyer, [12], 40.

ECCLESIASTIC COURT.

A will was suggested to have been burned, which was examined in the Ecclesiastic Court: this Court will not examine into it, as they have jurisdiction, [49], 139.

ELECTION.

After election to proceed at law, where if he fails, yet may revive his bill, for does not preclude his right, [4], 17.

EXECUTOR.

Whether to be allowed interest for money advanced before received any of the testator's, quære, [50], 143.

Bill by executor dismissed with costs out of assets, which if deny, to be examined on interrogatories, [62], 178.

FRAUD.

Where a general release is given, at which time more was due than paid at the time of the release, equity will relieve, [1, 2], 4.

If known, may be barred by the Statute of Limitations, else not, [36], 102.

A lease was made of charity lands to the nephew of the clerk, at a great undervalue, who sold it to the clerk; this deemed a fraudulent transaction, and the lease set aside, [40], 110.

FRAUD—*continued.*

Bargains relating to stock are within the Statute of Frauds; and if sold without earnest are nuda pacta, [41], 113.

A will of copyhold does not require three witnesses within the Statute of Frauds; but whether a trust of it declared by will does, quære, [42], 116.

Bond given to the father-in-law of the future husband, but defeasanced not to be put in suit unless misfortunes happen to the husband, is fraudulent to creditors, [46], 128.

Father, supposing his son tenant in fee, stands by and lets him make a settlement on marriage; he shall not defeat it on the foot of his real title, but be obliged to make it good, [59], 170.

A man, who had mortgaged his estate, after marriage settles the mortgaged premises on the wife, and then mortgages a second time, the mortgagee having notice of the jointure; the settlement being after marriage is voluntary, and fraudulent as to a purchaser, though had notice of it, [65], 182.

Money given by a person just before his death, not fraudulent as to creditors, [77], 216.

HEIR

Enters into articles for the sale of a reversion, the money to be paid with interest when he came into possession; this considered as so much paid down and put out to interest, and not relieved against, [7], 24.

Person agrees for a purchase, and pays part down, his executor shall be obliged to pay the residue, though the heir-at-law shall have the estate, [28], 86.

Heir-at-law, or hæres factus, shall have the personal estate applied to exonerate the real; but a remainderman shall not, [80], 224.

INFANT.

Subpœna for costs may be taken out either against the infant or prochein amy, [49], 138.

INJUNCTION.

In an injunction cause, if it abates by the death of either plaintiff or defendant, Court must be moved to revive within a stated time, or the injunction will be dissolved, [24], 77.

Where a demurrer is, cannot have injunction till the demurrer be argued, [*ib.*].

IRELAND.

Particular sequestration not to go there, [5], 21.

JOINTENANCY.

Devise to A. and B., the survivor and survivors of them, their heirs and assigns, to be equally divided between them, share and share alike, is a jointenancy for life, with different inheritances, [17], 59.

LEGACY

Given on pain of forfeiture if gave executor trouble; though does sue the executor, it will be no forfeiture in equity, [1], 1.

Legacies pecuniary, were given to all a man's children, payable at several

LEGACY—*continued.*

particular times, and a moiety of a term to one, after the decease of his wife; and that if he should die before the portion became payable, to go to survivors: this extends only to the pecuniary legacy, and not to the term, [12], 41.

Legacy charged on land, given over in case dies before twenty-two, not to be paid till the original legatee might have received it, [15], 54.

Legacy given to be paid at the age of twenty-one, or marriage with consent, which shall first happen, and devise over; marriage is had without consent, and dies before twenty-one, the legacy is gone, [26], 83.

A man indebted by bond to his servant, gives her a legacy of 500*l.* for her long and faithful service; though it be more than the bond, shall have both, [44], 124.

Legacy bears interest from a year after the testator's death; and payment to an infant good, [72], 200.

Where legacies are given to two, and a survivor created, and one dies in the life of the testator, the legacy is not lapsed, but shall survive, [73], 202.

LIMITATIONS.

Where will appoints the payment of debts, those barred by the Statute of Limitations shall be paid, [57], 164.

LIVERY

Supposed after great length of time, [81], 228.

LONDON.

Whether customary right of the wife be barred by the settlement of a chattel on her in bar of dower, if does not say in bar of the custom, [14], 50.

LUNACY.

Cannot be a special return to a commission of lunacy, [47], 130.

MERCHANT

Has diamonds consigned to him, who does not sell them, quære, whether commission for the custody. Court of opinion, that to be determined on a quantum meruit, whether the credit arising from the custody was not equal to the trouble, [16], 56.

MINES.

In mines of oar may sink in pursuit of the oar; aliter of pits, [79], 221.

MODUS

To pay a sum of money, but if in another person's hands, that, or tithe in kind, ill, [52], 150.

Not to be established without trial, if desired, [53], 151.

MORTGAGE

Was made conditioned to be redeemed with the mortgagor's own money; as this was designed for fraud, shall be let in to redemption, though the usual time prescribed by the rules of the Court be elapsed, [9], 31.

MORTGAGEE

In equity restrained from cutting of timber, unless it appears to be

MORTGAGEE—*continued.*

a defective security; but what does cut down, to go to sink the mortgage, [30], 92.

A long Exchequer annuity was deposited in a person's hands as a security; he could not subscribe it in the year 1720, for had it not as trustee, but for a particular purpose, [51], 144.

If mortgagee lets the estate, that shall be supposed the value, unless he shows otherwise, [53], 151.

Mortgagee charged for what he did or might receive; trustee only for actual receipts, [*ib.*], 152.

MORTGAGOR.

Though the time which is allowed by the rules of the Court be elapsed, yet if the mortgagor does any act to show he considered it as a mortgage, the Court will decree redemption, [9], 31.

If mortgagor is in possession of any part may redeem the whole, [55], 160.

Term renewed by mortgagor is for the benefit of the mortgagee, [*ib.*], 160.

NOTE.

Promissory note was given by a person, who had money in the hands of the person to whom it was given, instead of a receipt, and the note is assigned; in the hands of the assignee not to be considered as a receipt, [42], 117.

PAPIST.

A devise to a papist who is under the age of eighteen, the devisee has till eighteen years and half of age to conform, to prevent the disability created by 11 & 12 Will. III. c. 4, [22], 73.

PLEA.

Bill brought for discovery of the profits, and to set aside a purchase; defendant insists by answer that he is a purchaser, and not obliged to answer; held, though this might have been good by way of plea, yet having answered, the answer must answer the charges of the bill, [51], 146.

PORTIONS.

Maintenance not to exceed the interest of the portions, [21], 70.

16,000*l.* settled for daughters, if should die without issue male, that should die before twenty-one, with power to charge another estate with any sum for any children; he charges it with the payment of 8000*l.* for a daughter, and dies, leaving issue a daughter, and son who died without issue before twenty-one; the daughter shall have both sums, for the 8000*l.* cannot be supposed a satisfaction for the 16,000*l.*, [33], 96.

PURCHASER.

Voluntary settlement is void as to a purchaser for valuable consideration, though had notice of it, [65], 182.

A., who had confessed a judgment to B. in trust for C., sells, and after B. makes A. executor, whereby could not recover at law; equity will not assist against a purchaser, though it be by mere accident, [80], 225.

REHEARING.

On rehearing nothing is open but what is petitioned against; but if decree in general is petitioned against, though particular reasons are assigned, the whole is open, [13], 48.

On appeal all is open; aliter on rehearing, [24], 76.

REVIEW.

A commission of review is discretionary, which Court will not grant, where it is to bastardize issue, [47], 130.

A commission of review granted pending an indictment of forgery of the same will, on appeal may receive new matter, but on commission of review, can receive no new matter, unless there be a clause for that purpose, [48], 132.

REVIVOR.

Devisee cannot bring bill of revivor, but bill in nature of a bill of revivor, [53], 155.

Cannot bring bill of revivor for costs, though taxed, [54], 158.

REVOCATION.

Where a person has a power of revocation and limiting new uses, limiting new uses is a good execution of the power, if has no other lands, [44], 122.

SATISFACTION.

A person obliged to lay out money in trust to be settled on herself for life, remainder to the heirs of A., she buys lands not of the value of the trust-money, and devises those lands to B. who is heir-at-law to A., and also her own right heir, and gives several legacies, which could not be paid unless the devise were taken as a part satisfaction, and for that reason so decreed, [63], 179.

Where the same hand is to pay which has received, it is a satisfaction, [76], 213.

SECURITY.

Deed-poll for payment of an annuity, and after by will subjects his estate to the payment of it; shall have further security, and not rest on the deed-poll, [57], 163.

SETTLEMENT

Made after marriage is voluntary, and void against a purchaser for valuable consideration, though he had notice of it, [65], 182.

But if made in consideration of a sum of money, to which the husband was not entitled, though after marriage, it is good against purchasers, [*ib.*], 183.

SEQUESTRATION.

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TERM.

A man has a term originally made to his daughter-in-law, and after grows indebted, this shall not be fraud as to creditors, [78], 217.

TIME.

Livery supposed after great length of time, [81], 228.

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Partners in trade. Two persons join to do a particular piece of work; one refused to join in a suit to recover what was due; the other got his moiety; will not be obliged to pay half of that moiety to the other, [9], 29.

TRIAL.

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TRUSTEES,

Or those acting under them, cannot be purchasers, [13], 45.

A will of copyhold does not require three witnesses; but whether a trust of it declared by will does, quære; and whether the trust does not ensue the nature of the estate, [42], 116.

Trustee to be charged only for actual receipt; mortgagee for what he did, or might have received, [53], 152.

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Lease of the profits of a market was devised to a trustee for the benefit of an infant; when the lease was near expiring, the lessor refused to renew for the benefit of the infant, so lease made to trustee; shall be obliged to convey to the infant, [61], 175.

Trustee not to be compelled to suffer a recovery, unless it be on marriage, and to resettle the estate, [71], 195.

TRUST.

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Stevens and Co., Printers, Bell Yard, Lincoln's Inn.